APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18-1165 & 18-1166

IN RE: GREEKTOWN HOLDINGS, LLC, DEBTOR.

BUCHWALD CAPITAL ADVISORS, LLC, SOLELY IN ITS CAPACITY AS LITIGATION TRUSTEE TO THE GREEKTOWN LITIGATION TRUST,
Plaintiff-Appellant,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; KEWADIN CASINOS GAMING AUTHORITY,
Defendants-Appellees.

[Argued October 17, 2018
Decided and Filed February 26, 2019]

Before: CLAY and GRIFFIN, Circuit Judges; ZOUHARY, District Judge.*

CLAY, J., delivered the opinion of the court in which GRIFFIN, J., joined. ZOUHARY, D.J. (pp. 22-27), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge.

Plaintiff Buchwald Capital Advisors, LLC, in its capacity as litigation trustee for the Greektown Litigation Trust, appeals the district court's January 23, 2018 order affirming the bankruptcy court's dismissal of Plaintiff's complaint on the basis of

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

tribal sovereign immunity. Plaintiff's complaint seeks avoidance and recovery of allegedly fraudulent transfers made to Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority pursuant to the Bankruptcy Code of 1978, 11 U.S.C. §§ 544, 550. For the reasons set forth below, we **AFFIRM** the district court's dismissal.

BACKGROUND

Factual Background

This case arises out of the bankruptcy of Detroit's Greektown Casino (the "Casino") and several related corporate entities (collectively, the "Debtors"). Under the ownership and management of Defendant Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Defendant Kewadin Casinos Gaming Authority (collectively, the "Tribe"), the Casino opened in November 2000 and filed for bankruptcy in May 2008.

From the outset, the Tribe was under serious financial strain due to two obligations incurred in connection with the Casino. In 2000, the Tribe entered into an agreement with Monroe Partners, LLC ("Monroe") to pay $265 million in exchange for Monroe's 50% ownership interest in the Casino, giving the Tribe a 100% ownership interest in the Casino. And in 2002, the Tribe entered into an agreement with the City of Detroit to pay an estimated $200 million to build a hotel and other facilities at the Casino in exchange for a continued gaming license from the Michigan Gaming Control Board ("MGCB").

In 2005, the Tribe restructured the Casino's ownership to alleviate this strain. The Tribe created a new entity, Greektown Holdings, LLC ("Holdings"), which became the owner of the Casino, while several

pre-existing entities—all owned by the Tribe—became the owners of Holdings. This allowed the Tribe to refinance its existing debt, and allowed the intermediate entities to take on new debt, all to raise capital so that the Tribe could meet its financial obligations. Holdings, for example, took on $375 million of debt in various forms shortly after the restructuring.

The restructuring was subject to, and received, the approval of the MGCB. However, the MGCB conditioned its approval on the Tribe's adherence to strict financial covenants and other conditions. If those covenants and conditions were not satisfied, the MGCB could force the Tribe to sell its ownership interest in the Casino, or place the Casino into conservatorship.

On December 2, 2005, Holdings transferred approximately $177 million to several different entities. At least $145.5 million went to the original owners of Monroe—Dimitrios and Viola Papas, and Ted and Maria Gatzaros. At least $9.5 million went to other entities for the benefit of Dimitrios and Viola Papas, and Ted and Maria Gatzaros. And at least $6 million went to the Tribe.

Over the next three years, the Tribe attempted to raise additional capital to fully meet its financial obligations. However, by April 2008, the strain of these obligations had proved too much to bear, and the Tribe was in danger of losing both its ownership interest in the Casino—through failure to comply with the MGCB's restructuring conditions—and the Casino's gaming license—through failure to comply with the City of Detroit's development requirements. Accordingly, on May 29, 2008, the Debtors, including Holdings, the Casino, and other related corporate

entities, filed voluntary petitions for Chapter 11 bankruptcy.[1]

Under the Debtors' plan of reorganization, the Greektown Litigation Trust (the "Trust") was created to pursue claims belonging to the Debtors' estate for the benefit of unsecured creditors. Plaintiff Buchwald Capital Advisors, LLC (the "Trustee") was appointed as the Trust's litigation trustee, and in that capacity, the Trustee brought the instant case.

Procedural History

On May 28, 2010, the Trustee filed a complaint in the United States Bankruptcy Court for the Eastern District of Michigan. The Trustee's complaint alleges that, on December 2, 2005, Holdings fraudulently transferred $177 million to or for the benefit of the Tribe, and seeks avoidance and recovery of that amount pursuant to the Bankruptcy Code of 1978, 11 U.S.C. §§ 544, 550. The Tribe then filed a motion to dismiss the complaint on the grounds that the Tribe possessed tribal sovereign immunity from the Trustee's claims. The Trustee responded that that the Tribe did not possess tribal sovereignty (1) because Congress abrogated tribal sovereign immunity in the Bankruptcy Code of 1978, 11 U.S.C. §§ 106, 101(27), and (2) because the Tribe waived tribal sovereign immunity by actually or effectively filing the Debtors' bankruptcy petitions.[2] By stipula-

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[1] Both the bankruptcy and district courts assumed, for the purposes of considering the Tribe's motion to dismiss the Trustee's complaint on the basis of tribal sovereign immunity, that the Tribe exerted complete dominion and control over the Debtors such that the Tribe actually or effectively filed the Debtors' bankruptcy petitions. We do so as well.

[2] The Tribe's governing Tribal Code waives tribal sovereign immunity only "in accordance with [Code Sections] 44.105 or

tion of the parties, the bankruptcy court bifurcated the Tribe's motion—it would first decide whether Congress had abrogated the Tribe's immunity and then, if necessary, whether the Tribe had waived its immunity.

Regarding abrogation, the bankruptcy court denied the Tribe's motion to dismiss, holding that Congress had expressed its "clear, unequivocal, and unambiguous intent to abrogate tribal sovereign immunity" in 11 U.S.C. §§ 106, 101(27). (RE 1, Bankruptcy Court Opinion, No. 14-cv-14103, PageID # 43.) The Tribe appealed to the district court, which reversed, holding that Congress had not "clearly, unequivocally, unmistakably, and without ambiguity abrogate[d] tribal sovereign immunity" in 11 U.S.C. §§ 106, 101(27). (RE 5, District Court Opinion, PageID # 203.) The district court accordingly remanded the case to the bankruptcy court to decide whether the Tribe had waived its immunity.

Regarding waiver, and in light of the district court's holding on abrogation, the bankruptcy court granted the Tribe's motion to dismiss, holding (1) that the Tribe's litigation conduct "was insufficient to waive [tribal] sovereign immunity" since tribal law required an express board resolution, (2) that waiver of tribal sovereign immunity could not be "implied" through the litigation conduct of a tribe's alter ego or

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44.108." (RE 5, Tribal Code, PageID # 307.) Section 44.105 requires a "resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe" with respect to specific claims. (*Id.*) And Section 44.108, at the relevant time, waived sovereign immunity with respect to all claims arising from written contracts that involve "a proprietary function" of the Tribe. (*Id.* at PageID # 308-10.) Except as otherwise indicated, record citations refer to the record in district court action No. 16-cv-13643.

agent, and (3) that even if both of the above were possible, filing a bankruptcy petition does not waive tribal sovereign immunity "as to an adversary proceeding subsequently filed" against the tribe. (*Id.*, Bankruptcy Court Opinion, at PageID # 449, 464, 456.) The Trustee appealed to the district court which affirmed, similarly holding that no waiver of the Tribe's sovereign immunity could occur "in the absence of a board resolution expressly waiving immunity," and that the Trustee's "novel theory of implied waiver" through the "imputed" conduct of an alter ego or agent was foreclosed by binding precedent. (*Id.*, District Court Opinion, at PageID # 730, 744, 737.)

This appeal, regarding both abrogation and waiver, followed.

DISCUSSION

I. Standard of Review

On appeal from a district court's review of a bankruptcy court's order, we review the bankruptcy court's order directly rather than the intermediate decision of the district court. *In re McKenzie*, 716 F.3d 404, 411 (6th Cir. 2013). We review questions of subject matter jurisdiction, including sovereign immunity, *de novo*. *DRFP, LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 515 (6th Cir. 2010).

II. Analysis

A. Abrogation of Tribal Sovereign Immunity

Indian tribes have long been recognized as "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56,

98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). As such, they possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (quoting *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670). Yet this immunity is not without limit. Because Indian tribes are subject to Congress' plenary authority, Congress can abrogate tribal sovereign immunity "as and to the extent it wishes." *Id.* at 803-04, 134 S.Ct. 2024. To do so, Congress must "unequivocally" express that purpose. *Id.* at 790, 134 S.Ct. 2024 (quoting *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670). "The baseline position [however], [the Supreme Court] [has] often held, is tribal immunity . . . ." *Id.* Thus, Indian tribes possess this "core aspect[] of sovereignty" unless and until Congress "unequivocally" expresses a contrary intent. *Id.* at 788, 790, 134 S.Ct. 2024.

At issue in this case is whether Congress unequivocally expressed such an intent in the Bankruptcy Code of 1978, 11 U.S.C. §§ 106, 101(27). Section 106 provides, in relevant part, that "[n]ot withstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a *governmental unit* to the extent set forth in this section with respect to . . . Sections . . . 544 . . . [and] 550 . . . of [the Bankruptcy Code]." (emphasis added). Section 101(27) then provides that:

> [t]he term 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality,

> or a foreign state; or *other foreign or domestic government*.

(emphasis added). The Trustee asserts that, read together, these sections constitute an unequivocal expression of congressional intent to abrogate tribal sovereign immunity. The Tribe asserts that that they do not.

In resolving this dispute, a useful place to start is Congress' knowledge and practice regarding the abrogation of tribal sovereign immunity in 1978. As *Bay Mills* and *Santa Clara Pueblo* indicate, an unequivocal expression of congressional intent is as much the requirement today as it was then. In fact, the Supreme Court decided *Santa Clara Pueblo* just six months before Congress enacted the Bankruptcy Code. Given this timing—and the fact that the Court in *Santa Clara Pueblo* simply reaffirmed a requirement already in existence, *see United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)—the normal assumption that Congress was aware of this requirement when enacting the Bankruptcy Code is well-grounded. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

We also need not hypothesize whether Congress understood the meaning of "unequivocal," as Congress kindly demonstrated as much in the years immediately preceding its enactment of the Bankruptcy Code. *See*, *e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits

against an "Indian tribe").[3] The language used by Congress in these statutes accords with the Supreme Court's clear admonition that "[t]he term 'unequivocal,' taken by itself," means "admits no doubt." *Addington v. Texas*, 441 U.S. 418, 432, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (citing Webster's Third New International Dictionary (1961)). Taken in the context of tribal sovereign immunity—where an "eminently sound and vital canon" dictates that any doubt is to be resolved in favor of Indian tribes, *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976)—that definition must be read literally. In order to abrogate tribal sovereign immunity, Congress must leave *no doubt* about its intent.

Ostensibly evidence enough that Congress *has* left doubt about its intent in 11 U.S.C. §§ 106, 101(27), this issue "has been analyzed by a handful of courts, leading to two irreconcilable conclusions." *In re Greektown Holdings, LLC*, 532 B.R. 680, 686-87 (Bankr. E.D. Mich. 2015). On one side, the Ninth

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[3] At times, Congress also unequivocally—though unnecessarily—expressed its *lack* of intent to abrogate tribal sovereign immunity. *See*, *e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5332 ("Nothing in this chapter shall be construed as . . . impairing the sovereign immunity from suit enjoyed by an Indian tribe . . . ."). We normally assume congressional awareness of such relevant statutory precedent as well. *See Goodyear Atomic Corp.*, 486 U.S. 174, 184-85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988). Moreover, both of these practices also continued long after the enactment of the Bankruptcy Code. *See*, *e.g.*, Fair Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3104, 3250, 3002(7), 3002(10) (authorizing suits against an "Indian tribe"); USA PATRIOT Improvement and Reauthorization Act of 2005, 18 U.S.C. § 2346 ("Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe . . . .").

Circuit held in *Krystal Energy Co. v. Navajo Nation* that Congress *did* unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27). *See* 357 F.3d 1055, 1061 (9th Cir. 2004).[4] On the other, the Seventh Circuit held in *Meyers v. Oneida Tribe of Indians of Wisc.* that Congress *did not* unequivocally express such an intent in a statute with functionally equivalent language, and in doing so noted the applicability of its reasoning to 11 U.S.C. §§ 106, 101(27). *See* 836 F.3d 818, 827 (7th Cir. 2016).[5] Unsurprisingly, the arguments made by the Trustee and the Tribe here largely track the reasoning used in these cases. Thus, we turn there next.

In *Krystal Energy*, the court began with the fact that Indian tribes fall within the plain meaning of the terms "domestic" and "government," and have been repeatedly referred to by the Supreme Court as "domestic dependent nations." 357 F.3d at 1057 (citation omitted). The court reasoned that Indian

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[4] Several bankruptcy courts, using similar reasoning, have agreed. *See*, *e.g.*, *In re Platinum Oil Props., LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011); *In re Russell*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995); *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981).

[5] Several district courts, bankruptcy appellate panels, and bankruptcy courts, using similar reasoning, have agreed. *See*, *e.g.*, *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012); *In re Money Ctrs. of Am., Inc.*, No. 17-318-RGA, 2018 WL 1535464, at *3 (D. Del. Mar. 29, 2018); *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015); *In re Star Grp. Commc'ns, Inc.*, 568 B.R. 616 (Bankr. D.N.J. 2016); *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000); *see also In re Mayes*, 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003) (noting that 11 U.S.C. §§ 106 and 101(27) "probably" do not abrogate tribal sovereign immunity).

tribes are accordingly "simply a specific member of the group of domestic governments[] the immunity of which Congress intended to abrogate" when it used the phrase "other foreign or domestic government" in 11 U.S.C. § 101(27). *Id.* at 1058. Analogizing to state sovereign immunity, the court pointed out that "Congress clearly does not have to list all of the specific states, beginning with Alabama and ending with Wyoming;" rather it can instead just abrogate the immunity of "all states." *Id.* at 1059. Thus, the court concluded that by using the phrase "other foreign or domestic government," Congress effected a "generic abrogation" of sovereign immunity that unequivocally encompassed tribal sovereign immunity, "like that of all individual domestic governments." *Id.*

In support of its holding, the court in *Krystal Energy* also noted that it could find "no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class." *Id.* However, the Seventh Circuit in *Meyers* could and did find such a statute—the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1601 *et seq*.

FACTA authorizes suits against "person[s]" who accept credit or debit cards and then print certain information about those cards on receipts given to the cardholders. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n, 1681o. FACTA in turn defines "person" as "*any* individual, partnership, trust, estate, cooperative, association, *government*, or governmental subdivision or agency, or other entity." *Id.* § 1681a(b) (emphasis

added). In *Meyers*, Meyers argued that the phrase "any . . . government" unequivocally encompassed Indian tribes. 836 F.3d at 826. And in support of that argument, Meyers pointed to the functionally equivalent language at issue in *Krystal Energy*—"other foreign or domestic government" in 11 U.S.C. § 101(27).[6] *Id.* The Seventh Circuit, however, was unconvinced. *Id.*

In *Meyers*, the court began with the unequivocal expression of congressional intent requirement, and the canon that all doubt is to be resolved in favor of Indian tribes. *Id.* at 824. The court then listed statutes enacted around the time of the Bankruptcy Code in which Congress had unequivocally expressed such intent by authorizing suits against "Indian tribe[s]." *Id.* Turning to Meyers' argument about the phrase "any . . . government," the court reasoned that "[p]erhaps if Congress were writing on a blank slate, this argument would have more teeth, but Congress has demonstrated that it knows full and well how to abrogate tribal immunity." *Id.* "Congress . . . knows how to unequivocally [express that intent]. It did not do so in FACTA." *Id.* at 827.

The court then addressed the Ninth Circuit's conflicting opinion in *Krystal Energy*. While not "weigh[ing] in" on the precise issue of 11 U.S.C. §§ 106, 101(27), the Seventh Circuit made clear the flaw it saw in the Ninth Circuit's reasoning:

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[6] The language in FACTA is arguably *broader* than the language in 11 U.S.C. §§ 106, 101(27), as in FACTA the term "government" has no qualifying language preceding it. *See Republic Steel Corp. v. Costle*, 621 F.2d 797, 804 (6th Cir. 1980) ("The [statutory] exception was broadened by the elimination of [any] qualifying language.") (quotation omitted).

> Meyers argues that the district court dismissed his claim based on its erroneous conclusion that Indian tribes are not governments. He then dedicates many pages to arguing that Indian tribes are indeed governments. Meyers misses the point. The district court did not dismiss his claim because it concluded that Indian tribes are not governments. It dismissed his claim because it could not find a clear, unequivocal statement in FACTA that Congress meant to abrogate the sovereign immunity of Indian [t]ribes. *Meyers has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit. The answer to this question must be 'yes' unless Congress has told us in no uncertain terms that it is 'no[,]' [as] [a]ny ambiguity must be resolved in favor of immunity*. Of course Meyers wants us to focus on whether the Oneida Tribe is a government so that we might shoehorn it into FACTA's statement that defines liable parties to include 'any government.' But when it comes to [tribal] sovereign immunity, shoehorning is precisely what we cannot do. Congress' words must fit like a glove in their unequivocality.

Id. at 826-27 (emphasis added) (internal citations omitted).

As for the "the real question"—unequivocality—the court found that the district court's analysis "hit the nail on the head:"

> It is one thing to say 'any government' means 'the United States.' That is an entirely natural reading of 'any government.' But it's another thing to say 'any government' means 'Indian Tribes,' Against the long-held tradition of tribal

> immunity . . . 'any government' is equivocal in this regard.

Id. at 826 (alteration in original) (quoting *Meyers v. Oneida Tribe of Indians of Wisc.*, No. 15-cv-445, 2015 WL 13186223, at *4 (E.D. Wisc. Sept. 4, 2015)). Thus the court concluded that FACTA did not abrogate tribal sovereign immunity. *Id.* at 827. Significantly, a different panel of the Ninth Circuit has since favorably cited *Meyers* for this very heart of its analysis. In a case about the abrogation of federal sovereign immunity in the Fair Credit Reporting Act, the court reasoned that "[t]he same logic in *Meyers* applies with respect to the United States. The 'real question' in this sovereign immunity appeal is not whether the United States is a government; it is whether Congress explicitly [abrogated] sovereign immunity." *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018).

We find the Seventh Circuit's reasoning in *Meyers* —as applied to 11 U.S.C. §§ 106, 101(27)—persuasive. And though *Meyers* was decided after the district court's opinion in this case, the district court clearly would have found the reasoning persuasive as well. The district court correctly acknowledged that "[t]here cannot be reasonable debate that Indian tribes are both 'domestic' . . . and also that Indian tribes are fairly characterized as possessing attributes of a 'government.'" *In re Greektown Holdings*, 532 B.R. at 692. But that is not the real question. The real question is whether Congress—when it employed the phrase "other foreign or domestic government"—unequivocally expressed an intent to abrogate tribal sovereign immunity. "For the Litigation Trustee, it is enough to have established that Indian tribes are both 'domestic' and 'governments'"

to answer that question in the affirmative. *Id.* at 693. The district court however, could not say "that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally, and unmistakably express its intent to include Indian tribes . . . ."[7] *Id.* at 697. We agree. Establishing that Indian tribes are domestic governments does *not* lead to the conclusion that Congress unequivocally meant to include them when it employed the phrase "other foreign or domestic government."[8] *Id.* at 693.

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[7] The district court also noted that acknowledging the real question in this case provides a persuasive response to the *Krystal Energy* court's analogy to state sovereign immunity. *Id.* at 697. ("The faulty premise in this reasoning [that 'other foreign or domestic government' can be read to unequivocally include Indian tribes the same way 'states' can be read to unequivocally include Arizona] is that it presumes the very fact in contention, i.e., that 'domestic government' is a phrase clearly understood beyond all rational debate to encompass an Indian tribe, just as the word 'state' is clearly understood beyond all rational debate to encompass Arizona and the other 49 states.").

[8] The dissent disagrees on this point, framing its analysis around the question, "Is an Indian tribe a domestic government?" [App. 32a.] As this approach mirrors that taken by Meyers and by the court in *Krystal Energy*, we need not engage with it in great detail. However, to the extent that the dissent attempts to highlight the appeal of this approach by stating it as a "simple syllogism"—"Sovereign immunity is abrogated as to all governments. Indian tribes are governments. Hence sovereign immunity is abrogated as to Indian tribes." [App. 33a]—we note that the court in *Meyers* could easily have done the same with FACTA by stating the following: All people are subject to suit. All governments are people. Indian tribes are governments. Hence Indian tribes are subject to suit. And to the extent that the dissent attempts to distinguish *Meyers* based on FACTA's use of language authorizing suit against Indian tribes as opposed to language abolishing Indian tribes' immunity, that is a distinction without difference. Congress

This reasoning is both intuitive and in accordance with a broader survey of the case law. Notably, "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *Meyers*, 836 F.3d at 824 (quoting *In re Greektown Holdings*, 532 B.R. at 680). And there is only one example at the circuit court level. *Id.* (referring to the Ninth Circuit's decision in *Krystal Energy*). In contrast, there are numerous examples of circuits courts finding that tribal sovereign immunity was abrogated where the statute specifically referred to an "Indian tribe," and refusing to do so where it did not. *Compare*, *e.g.*, *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding that tribal sovereign immunity was abrogated in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15)); *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (finding that tribal sovereign immunity was abrogated in Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12)), *with Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (finding that tribal sovereign immunity was not abrogated in the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of*

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can abrogate tribal sovereign immunity by "stat[ing] an intent *either* to abolish Indian tribes' immunity or to subject tribes to suit." *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999) (emphasis added). But Congress must state that intent unequivocally. The dissent's reasoning does nothing to disguise the fact that it too has "lost sight of the real question in this sovereign immunity case." *Meyers*, 836 F.3d at 826-27.

Indians of Fla., 166 F.3d 1126, 1131 (11th Cir. 1999) (finding that tribal sovereign immunity was not abrogated in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 *et seq.*). Here, it is undisputed that no provision of the Bankruptcy Code mentions Indian tribes.[9]

While it is true that Congress need not use "magic words" to abrogate tribal sovereign immunity, it still must unequivocally express that purpose. *F.A.A. v. Cooper*, 566 U.S. 284, 290-91, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). The Trustee thus correctly states that "what matters is the clarity of intent, not the particular form of words." (Brief for Appellant at 32.) We need not—and do not—hold that specific reference to Indian tribes is in all instances required to abrogate tribal sovereign immunity;[10] rather we hold that 11 U.S.C. §§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity.

This analysis notwithstanding, the Trustee asserts three additional arguments that it contends dispel any doubt that Congress intended to abrogate the sovereign immunity of Indian tribes in 11 U.S.C. §§ 106, 101(27). None are persuasive.

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[9] The dissent deems this case law "irrelevant to the task of statutory interpretation before us." [App. 36a]. To the contrary, the fact that the Trustee and the dissent ask this Court to reach a holding "that deviates from all relevant decisions by our sister circuits," save for one, and "that is inconsistent with the Supreme Court's most recent guidance on the point" is highly relevant. *Armalite, Inc. v. Lambert*, 544 F.3d 644, 648 (6th Cir. 2008).

[10] For instance, a court might find an unequivocal expression of congressional intent in a statute stating that "sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity." *Krystal Energy*, 357 F.3d at 1058.

First, the Trustee asserts that Indian tribes must be "governmental units" because they avail themselves of other Bankruptcy Code provisions pertaining to "governmental units." (*See* Brief for Appellant at 27.) (describing how Indian tribes would have to be "governmental units" in order to be creditors or to file requests for payment of administrative expenses, which they regularly do). Yet, as the Tribe correctly responds, the Bankruptcy Code defines the entities covered by those provisions using the word "includes" —a term of enlargement. In contrast, 11 U.S.C. § 101(27) defines "governmental unit" using the word "means"—a term of limitation. *See United States v. Whiting*, 165 F.3d 631, 633 (8th Cir. 1999) ("When a statute uses the word 'includes' rather than 'means' in defining a term, it does not imply that items not listed fall outside the definition."). Thus it is not inconsistent for Indian tribes to be covered by those provisions noted by the Trustee but not covered by 11 U.S.C. § 101(27).

Second, and relatedly, the Trustee asserts that Indian tribes must be "governmental units" because the Bankruptcy Code provides governmental units with "special rights." (*See* Brief for Appellant at 30.) (describing how Congress would have shown less regard for the dignity of Indian tribes as sovereigns, compared to state, federal, and foreign governments, if they were not entitled to these special rights). Yet it could just as easily be said that Congress has shown *greater* respect for Indian tribes than for other sovereigns by *not* abrogating their immunity in the first place—and thus not necessitating the provision of any special rights. The immunities of various sovereigns also need not be, and in fact are not, co-extensive. *Bay Mills*, 572 U.S. at 800-01, 134 S.Ct.

2024. Moreover, these first two arguments raised by the Trustee both overlook the important distinction between being subject to a statute and being able to be sued for violating it. *See Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 755, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Only in the latter context is there an unequivocality requirement. Thus it would also not be inconsistent for Indian tribes to be considered "governmental units" for some provisions of the Bankruptcy Code but not for 11 U.S.C. § 106.

Lastly, the Trustee asserts that Indian tribes must be "governmental units" because the Tribe cannot supply an example of any other entity besides Indian tribes that the phrase "other foreign or domestic government" might have been intended to cover. Yet even if Indian tribes are the only sovereigns not specifically mentioned in 11 U.S.C. § 101(27), then "why not just mention them by their specific name, as Congress has *always* done in the past?" *In re Greektown Holdings*, 532 B.R. at 697. Congress' failure to do so, after arguably mentioning every other sovereign by its specific name, likely constitutes "circumstances supporting [the] sensible inference" that Congress meant to exclude them, pursuant to the familiar *expressio unius* canon. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002). Such an inference is certainly more sensible than the alternative inference that the Trustee's argument asks us to make—that Congress meant for Indian tribes to be the *only* sovereign covered by the phrase "other foreign or domestic government." Regardless, "this Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not

address." *Bay Mills*, 572 U.S. at 794, 134 S.Ct. 2024.[11]

"Determining the limits on the sovereign immunity held by Indians is a grave question; the answer will affect all tribes, not just the one before us." *Upper Skagit Indian Tribe v. Lundgren*, —— U.S. ——, 138 S.Ct. 1649, 1654, 200 L.Ed.2d 931 (2018). It is the graveness of this question that led to the requirement that Congress unequivocally express its intent in order to abrogate tribal sovereign immunity. And that requirement "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790, 134 S.Ct. 2024. Thus, the Supreme Court has repeatedly reaffirmed the requirement, and warned lower courts against abrogating tribal sovereign immunity if there is any doubt about Congress' intent. *See id.* at 800,

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[11] The dissent adds one, equally unpersuasive argument, asserting that Indian tribes must be "governmental units" because abrogation of tribal sovereign immunity aligns with the Bankruptcy Code's "purpose of establishing and enforcing a fair and equitable [asset] distribution procedure." [App. 38a]. Yet an interest in fairness and equity is not unique to bankruptcy. For instance, in *Florida Paraplegic*, the court held that the Americans with Disabilities Act—the purpose of which was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"—did not abrogate tribal sovereign immunity, and in doing so even acknowledged that this "may seem . . . patently unfair." 166 F.3d at 1128, 1135. Indeed, "immunity doctrines [of all kinds] inevitably carry with them the seeds of occasional inequities. . . . Nonetheless, the doctrine of tribal [sovereign] immunity reflects a societal decision that tribal autonomy predominates over other interests." *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986).

134 S.Ct. 2024 ("[I]t is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity."); *Kiowa*, 523 U.S. at 759, 118 S.Ct. 1700 ("The capacity of the Legislative Branch to address [this] issue by comprehensive legislation counsels some caution by us in this area."); *Santa Clara Pueblo*, 436 U.S. at 60, 98 S.Ct. 1670 ("[A] proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). We heed those warnings, and hold that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27).

B. Waiver

"Similarly [to the unequivocality requirement for congressional abrogation of tribal sovereign immunity], a tribe's waiver [of its sovereign immunity] must be 'clear.'" *C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)). The Trustee's argument that the Tribe clearly waived any tribal sovereign immunity it possessed has three analytical steps: (1) Indian tribes can waive sovereign immunity by litigation conduct, (2) alter egos or agents of Indian tribes can waive tribal sovereign immunity by litigation conduct, and (3) filing a bankruptcy petition waives sovereign immunity as to separate, adversarial fraudulent transfer claims. If each step is a correct statement of the law, then, according to the Trustee, the Tribe may have waived its immunity from the Trustee's fraudulent transfer claim by

actually or effectively filing the Debtors' bankruptcy petitions in federal court. We agree with the first step of the Trustee's analysis, but we disagree with the second and third steps. Tribal sovereign immunity can be waived by litigation conduct, but not by the litigation conduct of a tribe's alter ego or agent, and the litigation conduct of filing a bankruptcy petition does not waive tribal sovereign immunity as to a separate, adversarial fraudulent transfer claim. Accordingly, we hold that the Tribe did not waive its tribal sovereign immunity.

The first step of the Trustee's argument is that Indian tribes can waive sovereign immunity by litigation conduct. Both the bankruptcy and district courts disagreed, relying heavily on part of our decision in *Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917 (6th Cir. 2009). However, *Memphis Biofuels* does not foreclose this step.

In *Memphis Biofuels*, a contract between Memphis Biofuels and a corporation owned by the Chickasaw tribe included a provision by which both parties purported to waive all immunities from suit. *Id.* at 921-22. However, under the tribal corporation's charter, any waiver of sovereign immunity required a resolution approved by the tribe's board of directors. *Id.* Such a resolution was never obtained, and the question arose whether the tribal corporation possessed sovereign immunity. *Id.* We ultimately held that despite the contract provision purporting to waive all immunities, the Chickasaw tribe possessed tribal sovereign immunity because the contractual waiver was an "unauthorized act[]" that was "insufficient to waive tribal-sovereign immunity." *Id.* at 922. Because "board approval was not obtained, [the] charter control[led]" the issue. *Id.*

This holding, combined with the fact that the Tribe's governing code has a similar board resolution requirement that was undisputedly not satisfied, was enough for the bankruptcy and district courts to find that the Tribe did not waive its sovereign immunity. However, *Memphis Biofuels* involved no litigation conduct on the part of the Chickasaw tribe, and neither this Court nor the parties cited any of the Supreme Court cases pertaining to waiver of sovereign immunity by litigation conduct. Accordingly, *Memphis Biofuels*, like all cases, "cannot be read as foreclosing an argument that [it] never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

Thus we have yet to decide whether the doctrine of waiver of sovereign immunity by litigation conduct applies to Indian tribes. While the Supreme Court has long held that such waiver is possible for non-tribal sovereigns, *see*, *e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002); *Gardner v. New Jersey*, 329 U.S. 565, 566, 573, 67 S.Ct. 467, 91 L.Ed. 504 (1947); *Gunter v. Atl. Coast Line RR. Co.*, 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906), few courts have had the opportunity to extend the Supreme Court's holdings to Indian tribes. Those that have had the opportunity however, have largely chosen to do so, holding that certain types of litigation conduct by tribes constitute a sufficiently clear waiver of tribal sovereign immunity.

For example, two circuits have held that intervening in a lawsuit constitutes waiver. *See Hodel*, 788 F.2d at 773 ("By so intervening, a party 'renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the

intervenor and the adverse party.'") (citation omitted); *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981) ("By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party."). Similarly, two circuits have considered the possibility that removal of an action from state to federal court might constitute waiver. *See Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1023-24 (9th Cir. 2016); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1207-08 (11th Cir. 2012). While ultimately holding that removal did not constitute sufficiently clear waiver, these cases serve as additional examples of circuits willing to accept that some litigation conduct *may* constitute sufficiently clear waiver.

More relevant to the facts of this case, three circuits have held that filing a lawsuit constitutes waiver. *See Bodi*, 832 F.3d at 1017 ("By filing a lawsuit, a tribe may of course 'consent to the court's jurisdiction to determine the claims brought' and thereby agree to be bound by the court's decision on those claims.") (citation omitted); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) ("[B]y initiating this lawsuit, the Tribe 'necessarily consents to the court's jurisdiction to determine the claims brought adversely to it.'") (citation omitted); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) ("It is recognized, however, that 'when the sovereign sues it waives [some of its sovereign immunity].' . . . This doctrine equally applies to Indian tribes.") (citation omitted).

Like intervention, and unlike removal, filing a lawsuit manifests a clear intent to waive tribal sovereign

immunity with respect to the claims brought, and to assume the risk that the court will make an adverse determination on those claims. To hold otherwise would have significant implications. *See Rupp*, 45 F.3d at 1245 ("We will not transmogrify the doctrine of tribal sovereign immunity into one which dictates that the tribe never loses a lawsuit."); *Oregon*, 657 F.2d at 1014 ("Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit."). Thus, we hold that Indian tribes can waive their tribal sovereign immunity through sufficiently clear litigation conduct, including by filing a lawsuit.

The second step of the Trustee's argument is that alter egos or agents of Indian tribes can waive tribal sovereign immunity by litigation conduct. Both the bankruptcy and district courts disagreed, relying on a different part of our decision in *Memphis Biofuels*. *Memphis Biofuels* forecloses this step.

In *Memphis Biofuels*, we refused to apply "equitable doctrines" such as equitable estoppel and actual or apparent authority to attribute to the Indian tribe conduct that allegedly constituted waiver. 585 F.3d at 922. The alter ego doctrine is similarly equitable. *Trs. of Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC*, 581 F.3d 313, 317-18 (6th Cir. 2009). Thus, we hold that the litigation conduct of alter egos or agents of Indian tribes cannot be attributed to the tribes for the purpose of waiving tribal sovereign immunity. Such imputation would require an impermissible implication. *See Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670 ("It is settled that a waiver of [tribal] sovereign immunity cannot be implied . . . .").

In urging this Court to hold the opposite, the Trustee relies on *First Nat'l Bank v. Banco El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) and a handful of circuit court cases applying alter-ego and agency doctrines to find that foreign governments and states waived their sovereign immunity. Notably, however, the Trustee cites to no case in which these doctrines were applied to Indian tribes, and we can find none. (*See* Brief for Appellee at 37.) ("The Trustee then takes a tortured path—unsupported by a single case from any court anywhere . . . ."); *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706, 719 (Bankr. E.D. Mich. 2018) ("No court has ever applied the equitable doctrine of alter-ego/veil piercing to find a waiver of an Indian tribe's sovereign immunity . . . .").

The Trustee's cases concerning foreign and state governments are also unpersuasive. While the Supreme Court has held that the law of foreign sovereign immunity is "[i]nstructive" in cases involving tribal sovereign immunity, *C&L Enters.*, 532 U.S. at 421 n.3, 121 S.Ct. 1589, that is not the case where there is a clear conflict between the two. Significantly, the Foreign Sovereign Immunities Act ("FSIA") allows foreign governments to waive their sovereign immunity by implication. 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune . . . in any case in which the foreign state has waived its immunity either explicitly or by implication."). In contrast, Indian tribes cannot waive their immunity by implication. *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670 ("It is settled that a waiver of [tribal] sovereign immunity cannot be implied . . . ."); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006)

("There is simply no room to apply the FSIA by analogy. . . . [The FSIA] permits a waiver of immunity to be implied, while the Supreme Court permits no such implied waiver in the case of Indian tribes.").

Analogizing to state sovereign immunity is equally unhelpful. Though it carries a similar ban on waiver by implication, *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999), it is "not congruent with" tribal sovereign immunity. *Three Affiliated Tribes of Fort Berthold v. Wold Eng'g*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); *see also Bodi*, 832 F.3d at 1020 ("Tribal immunity is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility."). A good example of such incongruency is provided by a set of cases dealing precisely with waiver by litigation conduct—specifically, the removal of a case from state to federal court. *States* that remove cases against them waive their sovereign immunity, while *tribes* that remove cases against them likely do not. *Compare Lapides*, 535 U.S. at 617, 122 S.Ct. 1640, *with Bodi*, 832 F.3d at 1020; *Contour Spa*, 692 F.3d at 1206, 1208. Accordingly, we do not place great weight on those cases concerning the litigation conduct of alter egos or agents of foreign and state governments.

The third and final step of the Trustee's argument is that filing a bankruptcy petition waives tribal sovereign immunity as to separate, adversarial fraudulent transfer claims. As the analysis of the first step hinted, whether a waiver of sovereign immunity has occurred is an inquiry separate and distinct from a waiver's scope. For instance, filing a lawsuit constitutes waiver by litigation conduct, but

that waiver is a limited one. It waives sovereign immunity as to the court's decision on the claims brought by the tribe, *see Bodi*, 832 F.3d at 1017, but not as to counterclaims brought against the tribe, even where compulsory. *Okla. Tax*, 498 U.S. at 509, 111 S.Ct. 905.[12]

The Trustee relies on *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006), in contending that filing a bankruptcy petition waives tribal sovereign immunity to separate, adversarial fraudulent transfer claims. However, while the Supreme Court did hold as much in *Katz*, its holding pertained only to *state* sovereign immunity, and does not merit extension. In addition to the limited utility of any parallels between the two doctrines as noted above, the Supreme Court in *Katz* based its holding primarily on the unique relationship between states, the Constitution, and federal bankruptcy law. *See id.* at 362-63, 378, 126 S.Ct. 990 ("The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited

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[12] Those circuits that have held that filing a lawsuit constitutes a waiver of tribal sovereign immunity recognize an exception to the rule in *Okla. Tax* for counterclaims sounding in equitable recoupment—a defensive action to diminish a plaintiff's recovery as opposed to one asserting affirmative relief. *See, e.g.*, *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1099 (9th Cir. 2017); *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D.*, 50 F.3d 560, 562 (8th Cir. 1995); *Jicarilla Apache Tribe*, 687 F.2d at 1346. We need not decide whether to join these circuits as it is undisputed that the Trustee's fraudulent transfer claim does not sound in equitable recoupment.

subordination of state sovereign immunity in the bankruptcy arena. . . . The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to [federal bankruptcy law]. . . . In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted . . . .").

Because of this reasoning, courts have been reluctant to extend the holding in *Katz* from states to other sovereigns, and we choose not to do so here. *See*, *e.g.*, *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 253 n.6 (5th Cir. 2006) ("Regardless what effect *Katz* has with respect to some aspects of state or local governmental units' encounters with bankruptcy, *Katz* has no effect on this case involving federal sovereign immunity."). Extension to Indian tribes in particular would certainly not accord with the reasoning in *Katz*, given the tribes' obvious absence from the Constitutional Convention. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties."). Thus, we hold that the filing of a bankruptcy petition does not waive tribal sovereign immunity as to separate, adversarial fraudulent transfer claims, and ultimately that the Debtors' doing so did not waive the Tribe's tribal sovereign immunity as to the Trustee's fraudulent transfer claim.

CONCLUSION

It is not lost on this Court that the Trustee may regard this result—dismissal of its complaint—as unfair. The Supreme Court has acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating this doctrine" given that tribal sovereign immunity "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter." *Kiowa*, 523 U.S. at 758, 118 S.Ct. 1700. "[B]ut that is the reality of sovereign immunity." *Memphis Biofuels*, 585 F.3d at 922. As stated above, "[i]mmunity doctrines [of all kinds] inevitably carry within them the seeds of occasional inequities. . . . Nonetheless, the doctrine of tribal [sovereign] immunity reflects a societal decision that tribal autonomy predominates over other interests." *Hodel*, 788 F.2d at 781. Accordingly, we defer to Congress and the Supreme Court to exercise their judgment in this important area.

For the reasons set forth above, we **AFFIRM** the district court's dismissal.

DISSENT

ZOUHARY, District Judge, dissenting.

What we are looking for in the Bankruptcy Code is an "unequivocal expression of . . . legislative intent" to abrogate tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Such an expression need not be stated in "any particular way" nor use any "magic words." *FAA v. Cooper*, 566 U.S. 284, 291, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). The "proper focus" of

this inquiry is on "the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 231, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). When we look for this unequivocal expression, we employ our "traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008).

I

We begin with the text. Section 106(a) of the Code states that "sovereign immunity is abrogated as to a governmental unit." 11 U.S.C. § 106(a). Right off the bat, we have an explicit, unmistakable statement from Congress that it intends to abrogate sovereign immunity. The sole remaining question is whose sovereign immunity.

For the answer to that question, we turn to Section 101(27), which provides:

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government*.

11 U.S.C. § 101(27) (emphasis added). In this definition, Congress chose to speak broadly. It chose to abrogate the sovereign immunity of all those governmental entities listed explicitly in Section 101(27), and, on top of those, any "other foreign or domestic government." In other words, Congress abrogated the sovereign immunity of any government, of any type, anywhere in the world. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057

(9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004) ("[L]ogically, there is no other form of government outside the foreign/domestic dichotomy . . . .").

Because the statute contains clear language that "sovereign immunity is abrogated" and that language applies to domestic governments, the sole remaining question is one the majority ignores: Is an Indian tribe a domestic government? A tribe is certainly domestic, residing and exercising its sovereign authority within the territorial borders of the United States. And a tribe is a form of government, exercising political authority on behalf of and over its members.

Supreme Court precedent supports this natural reading. The Court refers to Indian tribes as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)); *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (comparing Indian tribes to states and foreign sovereigns and concluding that both states and Indian tribes are "domestic" sovereigns). The Court says that tribal sovereign immunity itself derives from "Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986). Indeed, the Court explains the basis of tribal sovereign immunity by comparing Indian tribes to "other governments." *Turner v. United States*, 248 U.S. 354, 357, 39 S.Ct. 109, 63 L.Ed. 291 (1919) ("Like other governments, municipal as well

as state, the Creek Nation was free from liability . . . ."). This comparison to "other governments" makes sense only if tribes are themselves governments.

Congress, too, says Indian tribes are domestic governments, as numerous provisions of the United States Code demonstrate. *See*, *e.g.*, 6 U.S.C. § 572(a) (directing cooperation with "State, local, and tribal governments"); 15 U.S.C. § 7451(a)(2) (authorizing various cybersecurity activities that include "State, local, and tribal governments"); 19 U.S.C. § 4332(d)(4)(A)(i) (requiring sharing of best practices concerning a safety plan with "State, local, and tribal governments"); 23 U.S.C. § 202(a)(1)(B)-(C) (providing for funding of certain programs and projects "administered by" or "associated with a tribal government"); 51 U.S.C. § 60302(2) (authorizing research and development "to enhance Federal, State, local, and tribal governments' use of" certain technologies); *see also* 25 U.S.C. § 4116(b)(2)(B)(ii)(I) (referring to a "government-to-government relationship between the Indian tribes and the United States").

The clear textual evidence of congressional intent to abrogate tribal sovereign immunity in Sections 106(a) and 101(27) is stated as a simple syllogism: Sovereign immunity is abrogated as to all governments. Indian tribes are governments. Hence sovereign immunity is abrogated as to Indian tribes. *See In re Russell*, 293 B.R. 34, 40 (Bankr. D. Ariz. 2003) (explaining that logical deduction from express statutory language satisfies a standard of unequivocality). Taken together, the text of Sections 106(a) and 101(27) form a clear expression of legislative intent to abrogate the sovereign immunity of Indian tribes.

II

But if this expression is so clear, the majority asks, then how could two circuit courts come to seemingly opposite conclusions about it? *Compare Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 826 (7th Cir. 2016), *with Krystal Energy*, 357 F.3d at 1061. This alleged circuit split is less of a conflict than the majority opinion suggests. The only appellate court to rule previously on this question—whether the Bankruptcy Code abrogates tribal sovereign immunity—is the Ninth Circuit in *Krystal Energy*. That court held the Code abrogates immunity. *Krystal Energy*, 357 F.3d at 1061.

The Seventh Circuit in *Meyers* was looking at different language in a different statute. In *Meyers*, the statute at issue was the Fair and Accurate Credit Transaction Act (FACTA). Meyers wanted to sue the Oneida Tribe because he made credit card purchases at tribe-run businesses, and those businesses produced receipts revealing his credit card number, in violation of FACTA. At issue was whether FACTA abrogated tribal sovereign immunity. The statute provides, "[N]o *person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1) (emphasis added). It states that any "person" who violates the statute shall be subject to civil liability. 15 U.S.C. §§ 1681n, 1681o. FACTA defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government* or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b) (emphasis added).

The Seventh Circuit held that this statutory language did not abrogate tribal sovereign immunity. It reasoned that the term "government," as it appears in FACTA, left ambiguity about whether that word alone was intended to abrogate tribal sovereign immunity. *Meyers*, 836 F.3d at 820. But nowhere in *Meyers* did the Seventh Circuit say that Indian tribes are not governments. Further, the Seventh Circuit explicitly steered clear of ruling on how the term "government," as it appears in the Bankruptcy Code, might apply to Indian tribes. *Id.* at 826 ("We need not weigh in on . . . how to interpret the breadth [of] the term 'other domestic governments' under the Bankruptcy Code . . . .").

The Seventh Circuit finding of ambiguity in FACTA does not affect our analysis of the Bankruptcy Code. Consider how different the FACTA text is from that of the Bankruptcy Code. The Bankruptcy Code states, in no mistakable terms, "sovereign immunity is abrogated as to a governmental unit." 11 U.S.C. § 106(a). FACTA, on the other hand, merely declares a rule that applies to "person[s]" and says that "person[s]" shall be liable for rule violations. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n, 1681o. Where FACTA makes no mention of sovereign immunity, the Code targets it directly.

Next, consider the differences in the definition sections. The Bankruptcy Code defines "governmental units" using several specific terms and a broad, catch-all term at the end. 11 U.S.C. § 101(27). And all these terms have one common thread: they are entities that would otherwise be entitled to sovereign immunity. Contrast that with the FACTA definition of "person," which mostly lists entities that would not otherwise be entitled to sovereign

immunity. *See* 15 U.S.C. § 1681a(b). These definitions are not "functionally equivalent." [App. 11a-12a]. One gives far more evidence of intent to abrogate the sovereign immunity of any government of any type.

No wonder the Seventh Circuit could not say "with 'perfect confidence'" that Congress intended FACTA to abrogate tribal sovereign immunity. *Meyers*, 836 F.3d at 827 (quoting *Dellmuth*, 491 U.S. at 231, 109 S.Ct. 2397). In contrast, the Bankruptcy Code has no such lack of textual evidence. This is why the only other circuit court to address this question concluded, "Because Indian tribes are domestic governments, Congress has abrogated their sovereign immunity." *Krystal Energy*, 357 F.3d at 1061.

Although *Meyers* and *Krystal Energy* can be reconciled based on these differences in statutory language, there is one point of reasoning upon which they—and I with the majority—fundamentally disagree. *Meyers* and the majority seem to think it important that the Bankruptcy Code does not mention the words "Indian tribe" and that "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *Meyers*, 836 F.3d at 824 (quoting *In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015)); *see also* [App. 16a]. Such an observation highlights the lack of on-point precedent to guide our decision, but it is otherwise irrelevant to the task of statutory interpretation before us.

In the majority's focus on these "magic words," *Cooper*, 566 U.S. at 291, 132 S.Ct. 1441, it ignores the differences in statutory language between the

statutes analyzed in other cases and the one before us today. The Circuit and Supreme Court opinions referenced by the majority analyzed statutes that featured neither the Bankruptcy Code's clear language that "sovereign immunity is abrogated" nor its all-encompassing, sovereign-focused definition of "governmental unit." Our task is to determine whether "the language of the statute" contains an unequivocal expression of intent to abrogate sovereign immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Our task is not to hold Congress to a standard of speaking as precisely as it possibly can or to demand that it use the same words today as it has in the past.

Justice Scalia, providing the fifth vote in *Dellmuth*, emphasized this point, saying that "congressional elimination of sovereign immunity in statutory text" need not make "explicit reference" to any particular terms. *Dellmuth*, 491 U.S. at 233, 109 S.Ct. 2397 (Scalia, J., concurring). So long as the language of the statute, in whatever form, clearly subjects the sovereign to suit, that will suffice to abrogate immunity. *Id.*; *see also United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, C.J.) ("Congress can embody a similar . . . intent in different ways in different statutes.").

As *Krystal Energy* held and as explained above, the Code's text forms a clear expression of legislative intent to abrogate the sovereign immunity of Indian tribes.

III

Where the text gives clear evidence of congressional intent to abrogate, courts may look to the larger statutory scheme to "dispel[]" any "conceivable

doubt" of that intent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56-57, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *see also Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). We next look to the Bankruptcy Code's purpose.

"[T]he object of bankruptcy laws is the equitable distribution of the debtor's assets amongst his creditors . . . ." *Kuehner v. Irving Tr. Co.*, 299 U.S. 445, 451, 57 S.Ct. 298, 81 L.Ed. 340 (1937). "Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally." S. Rep. No. 95-989, at 49 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5835; H.R. Rep. No. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6297; *see also Begier v. I.R.S.*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

The Code's purpose of establishing and enforcing a fair and equitable distribution procedure is consistent with the broad abrogation of Sections 106(a) and 101(27). With a broad abrogation of immunity, all governments must play by the rules. This context in no way contradicts the text's plain meaning—sovereign immunity is abrogated as to any government, including Indian tribes. Congress expressed its intention unequivocally.

For these reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 16-cv-13643

Bankr. Case No. 08-53104

Adv. Pro. 10-05712

BUCHWALD CAPITAL ADVISORS, LLC, LITIGATION TRUSTEE FOR THE GREEKTOWN LITIGATION TRUST,
Appellants,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; AND KEWADIN CASINOS GAMING AUTHORITY,
Appellees.

IN RE: GREEKTOWN HOLDINGS, LLC,
Debtor,

BUCHWALD CAPITAL ADVISORS, LLC, SOLELY IN ITS CAPACITY AS LITIGATION TRUSTEE FOR THE GREEKTOWN LITIGATION TRUST,
Plaintiff,

v.

DIMITRIOS ("JIM") PAPAS, ET AL.,
Defendants.

[Signed January 23, 2018]

OPINION AND ORDER AFFIRMING THE BANKRUPTCY COURT'S SEPTEMBER 29, 2016 OPINION AND ORDER GRANTING THE TRIBE DEFENDANTS' MOTION TO DISMISS AND DISMISSING THEM WITH PREJUDICE FROM THE ADVERSARY PROCEEDING

Paul D. Borman, United States District Judge

INTRODUCTION

In this appeal, the Litigation Trustee seeks a reversal of the Bankruptcy Court's holding that the Appellees, the Sault Ste. Marie Tribe of Chippewa Indians ("the Tribe") and Kewadin Casinos Gaming Authority ("Kewadin Authority") (Appellees or collectively "the Tribe Defendants"), did not waive their sovereign immunity to the claims asserted in the Adversary Proceeding and dismissing them from the Adversary Proceeding. For the reasons that follow, the Court AFFIRMS the Bankruptcy Court and DISMISSES the Tribe Defendants from this Adversary Proceeding.

I. BACKGROUND

A. Procedural History of this Adversary Proceeding

On May 29, 2008, Greektown Holdings, LLC and certain affiliates (collectively the "Debtors"), commenced proceedings under Chapter 11 of the United States Bankruptcy Code, *In re: Greektown Holdings, LLC, et al., Debtors* (E.D. Mich. Bankr. No. 08-53104, ECF No. 1).[1] On or about May 28, 2010, this Adver-

[1] The Debtors in the jointly administered cases are Greektown Holdings, L.L.C. ("Holdings"); Greektown Casino, L.L.C. ("Greektown Casino"); Kewadin Greektown Casino ("Kewadin"); Monroe Partners, L.L.C. ("Monroe"); Greektown Holdings II, Inc.

sary Proceeding was commenced, *The Official Committee of Unsecured Creditors on Behalf of the Estate of Greektown Holdings, LLC*[2] *v. Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros, Maria Gatzaros, Barden Development, Inc., Lac Vieux Desert Band of Lake Superior Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, Kewadin Casinos Gaming Authority, and Barden Nevada Gaming, LLC*, (E.D. Mich. Bankr. Adv. Pro. No. 10-05712). The Complaint in the Adversary Proceeding alleges that $177 million was fraudulently transferred by the debtor, Greektown Holdings, LLC ("Holdings"), to the Defendants for no or inadequate consideration. (Adv. Pro. ECF No. 1, Complaint.)[3] The Complaint alleges that the fraudulent transfers from Holdings may be avoided and recovered under sections 544 and 550 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, and under the Michigan Uniform Fraudulent Transfers Act ("MUFTA") (Mich. Comp. Laws § 566.31, *et seq.*).

("Holdings II"); Contract Builders Corporation ("Builders"); Realty Equity Company Inc. ("Realty"); and Trappers GC Partner, LLC ("Trappers").

[2] By Stipulation dated August 9, 2012 (and approved by Consent Order dated August 14, 2010) the Defendants agreed that Buchwald Capital Advisors LLC ("Buchwald"), in its capacity as the Litigation Trustee of the Greektown Litigation Trust and in its capacity as the Trustee of the Greektown General Unsecured Creditors Distribution Fund Trust, replace the Official Committee of Unsecured Creditors of Greektown Holdings, LLC (the "Committee") as Plaintiff in this Adversary Proceedings. (Bankr. ECF. No. 3359, p. 3 ¶ 8.) When referring to docket entries in the underlying Bankruptcy Proceeding, (E.D. Mich. Bankr. No. 08–53104), the Court will use the reference "Bankr. ECF No. ___."

[3] When referring to docket entries in the MUFTA Adversary Proceeding, (Adv. Pro. No. 10–05712), the Court will use the reference "Adv. Pro. ECF No. ___."

Shortly after the Adversary Proceeding was commenced, on June 25, 2010, the Tribe Defendants filed a motion to dismiss the MUFTA claims against it on the grounds of sovereign immunity. (Adv. Pro. ECF No. 8.) The parties stipulated to bifurcate the motion to dismiss to first have the Bankruptcy court decide the purely legal question of whether Congress, in Section 106(a) of the Bankruptcy Code, abrogated the Tribe's sovereign immunity and thereafter, if necessary, to decide whether the Tribe waived its sovereign immunity by participating in the Bankruptcy proceedings. The Bankruptcy Court heard oral argument on the Congressional abrogation issue on December 29, 2010, and took the matter under advisement.

While the issue of Congressional abrogation of sovereign immunity was still under advisement in the Bankruptcy Court, in 2012, the Tribe Defendants and the Litigation Trustee reached a settlement, filed a motion to have the settlement approved and requested that the Bankruptcy Court hold off issuing its ruling on the Tribe's motion to dismiss pending a decision on the Settlement Motion. This Court ultimately approved the Settlement Agreement, which contained a claims bar order that was an important aspect of the Settlement Agreement. (*In re Greektown Holdings, LLC*, Case No. 12-12340, ECF No. 10, Opinion and Order Granting Corrected Motion for Order Approving Settlement Agreement.)

The non-settling Defendants in the Adversary Proceeding, Maria Gatzaros, Ted Gatzaros, Dimitrios Papas and Viola Papas ("the Papas and Gatzaros Defendants"), appealed the Court's Order approving the Settlement Agreement to the Sixth Circuit, objecting to the inclusion of the claims bar order.

(*In re Greektown*, No. 12-12340, ECF No. 33, Notice of Appeal.) The Sixth Circuit reversed and remanded with instructions to this Court to reconsider the propriety and breadth of the claims bar order. *Papas v. Buchwald Capital Advisors LLC (In re Greektown Holdings, LLC)*, 728 F.3d 567 (6th Cir. 2013). With the claims bar order under fire, the parties stipulated in this Court to withdraw the motion for an order approving the settlement and the proceeding before this Court was dismissed. (*In re Greektown*, No. 12-12340, ECF Nos. 48, 49, Stipulation and Dismissal.) The parties thereafter agreed to voluntary mediation before Bankruptcy Chief Judge Phillip Shefferly in an effort to resolve all of the claims against the all of the remaining Defendants in the MUFTA Adversary Proceeding. Despite their efforts under Judge Shefferly's guidance, the parties were unable to achieve a settlement of the Adversary Proceeding. (Adv. Pro. ECF No. 449, Mediator's Certificate, 6/2/2014).

On June 9, 2014, with settlement negotiations at a standstill, the Tribe Defendants renewed the 2010 motion to dismiss on the grounds of sovereign immunity. (Adv. Pro. ECF No. 453, Renewed and Supplemented Motion to Dismiss Adversary Proceeding Re: Sovereign Immunity.) The parties renewed their stipulation to have the Bankruptcy Court first determine whether Congress had abrogated the Tribe Defendant's sovereign immunity in section 106 of the Bankruptcy Code and, only if no congressional abrogation was found, to then determine whether the Tribe Defendants had waived sovereign immunity for purposes of this MUFTA proceeding. On August 13, 2014, the Bankruptcy Court issued its Opinion and Order Denying the Tribe's Renewed and Supplemented Motion, concluding that "Congress sufficiently,

clearly, and unequivocally intended to abrogate [the Tribe's] sovereign immunity in [section 106 of the Bankruptcy Code]." (Adv. Pro. ECF No. 474 at 36, August 12, 2014 Opinion and Order.) The Tribe Defendants appealed Bankruptcy Judge Walter Shapero's ruling and this Court reversed, holding that Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes in section 106 of the Bankruptcy Code. *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015). This Court remanded the matter to the Bankruptcy Court for further proceedings on the issue of whether the Tribe Defendants waived sovereign immunity, as outlined by the Bankruptcy Court in its December 23, 2010 Stipulated Order bifurcating the sovereign immunity issue.

On September 29, 2016, the Bankruptcy Court issued its Opinion and Order finding that the Tribe had not waived its sovereign immunity and granting the Tribe's motion to dismiss for lack of jurisdiction on the basis of sovereign immunity. *In re Greektown Holdings, LLC*, 559 B.R. 842 (Bankr. E.D. Mich. 2016). The Litigation Trustee has now appealed the Bankruptcy Court's September 29, 2016 Opinion and Order. This Court heard oral argument on the waiver appeal on April 10, 2017. Following the hearing and while the matter was still under advisement, the Litigation Trustee and the Tribe Defendants participated in a global facilitation effort, along with the Papas and Gatzaros Defendants, under the direction of retired United States District Court Judge Gerald Rosen. On September 26, 2017, the parties notified the Court that those efforts were unsuccessful in resolving the matter, thus necessitating this Court's resolution of the Litigation Trustee's appeal of Judge

Shapero's September 29, 2016 Opinion and Order finding no waiver of sovereign immunity by the Tribe Defendants and dismissing the Tribe Defendants from the MUFTA Adversary Proceeding.

B. The Bankruptcy Court's September 29, 2016 Opinion and Order

The Bankruptcy Court concluded that *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009), in which the Sixth Circuit held that where a tribal charter requires board approval to waive sovereign immunity, nothing short of such an express approval will operate to waive tribal immunity, foreclosed the Litigation Trustee's MUFTA proceeding against the Tribe Defendants. 559 B.R. at 846-48. Judge Shapero reasoned that because it is undisputed that the governing charter here required a board resolution waiving sovereign immunity as to the MUFTA claims, and it is also undisputed that no such resolution was adopted, and because it is likewise undisputed that the Tribe did not enter into any contract or agreement by which it expressly agreed to waive sovereign immunity as to the MUFTA claims, *Memphis Biofuels* precluded any suit against the Tribe Defendants to which the Tribe's board had not expressly consented by board resolution. *Id.* Judge Shapero reasoned that because *Memphis Biofuels* held that "unauthorized acts of tribal officials are insufficient to waive tribal sovereign immunity," no conduct of the Tribe short of an express board resolution could serve to waive the Tribe Defendant's sovereign immunity.

Judge Shapero further held, rejecting the Litigation Trustee's alternative argument that the Tribe Defendants waived sovereign immunity by participating in the underlying Bankruptcy proceeding,

that the "Tribe Defendants' participation in the claims allowance and confirmation process has not, as a matter of law, constituted a waiver of sovereign immunity that is broad enough to encompass this entire adversary proceeding against them, which seeks to recover alleged fraudulent transfers." 559 B.R. at 849-50. The Bankruptcy Court extended this holding and found that even if, as alleged by the Litigation Trustee, the Tribe Defendants caused the Debtors to file the Bankruptcy Petition in this action, the Tribe did not thereby waive its sovereign immunity to the MUFTA adversary proceeding filed against them. *Id.* at 851-52.

C. Factual Background as Relevant to This Appeal

It is undisputed, as alleged in the Complaint in this Adversary Proceeding, that the Tribe Defendants have appeared and participated in the claims allowance process in the underlying Greektown Bankruptcy proceedings (Bankr. Case No. 08-53104) by filing certain proofs of claim (*see*, *e.g.*, Bankr. ECF Nos. 263, 280, 282, 325, 2314) and by filing appearances and objections in that proceeding (*see*, *e.g.*, Bankr. ECF Nos. 706, 751, 1404, 1654, 1990, 2236).[4] Each of the Notices of Appearance filed by the Tribe Defendants in the underlying Greektown Bankruptcy proceedings expressly stated that the Tribe Defendants did not thereby consent to the exercise of jurisdiction over them and specifically reserved the right to assert all affirmative defenses, including lack of subject matter jurisdiction. (*See ibid*; Adv. Pro. ECF No. 649-1, Tribe Defs.' Mot. to Dismiss at 13.) Likewise,

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[4] When referring to docket entries in the underlying Greektown bankruptcy case, (Bankr. No. 08–53104), the Court will use the reference "Bankr. ECF No. ___."

the Tribe Defendants' Objections filed in the underlying Greektown Bankruptcy proceedings also expressly sought to preserve the Tribe Defendants' right to assert all available affirmative defenses, resulting in the final Plan Confirmation Order acknowledging that the Tribe Defendants are not deemed to have waived or released their right to assert all available defenses in any potential avoidance claim filed against them. (Bankr. ECF No. 2046, Order Confirming Second Amended Joint Plans; Adv. Pro. ECF No. 649-1, Tribe Defs.' Mot. to Dismiss at 13.)

Also undisputed is the fact that the Tribe's governing Tribal Code (which applies equally to the Kewadin Gaming Authority, an instrumentality of the Tribe established pursuant to the Gaming Authority Charter and defined as a "Tribal Entity" pursuant to the Tribal Code) expressly defines the limited conditions under which the Tribe Defendants may waive their sovereign immunity. (Adv. Pro. ECF No. 649-1, Ex. A, Affidavit of Candace Blocher, Exs. B, C, Chapters 44 and 94 respectively of the Tribal Code.)[5] The Tribal Code provides in relevant part that "[t]he sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly reaffirmed unless such immunity is waived in accordance with '44.105 or

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[5] The Chapter of the Tribal Code directly addressing waiver of tribal immunity in commercial transactions delineates the characteristics that define a "Tribal Entity," and expressly provides that "[f]or purposes of this Chapter, corporations, partnerships, limited liability companies, or similar entities formed under the laws of any State shall not be Tribal entities; provided, that this provision shall not affect the sovereign immunity of the Tribe with regard to any such State entity." (Adv. Pro. ECF No. 649-6, Tribal Code, Chapter 44, Section 44.103.)

'44.108." (*Id.* § 44.104.) Section 44.105 provides in relevant part that the sovereign immunity of the Tribe may be waived "(a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that any such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law . . . or (b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specially by resolution of the Board of Directors . . . ." (Tribal Code § 44.105(1)(a)(b).) Section 44.108 provides a waiver of sovereign immunity "for any claim sounding in contract" arising from an express, written, and signed contract involving a proprietary function of the Tribe."

It is also undisputed that: (1) there is no Board resolution waiving the Tribe Defendants' tribal immunity and consenting to suit on the claims asserted in this MUFTA Adversary Proceeding; and (2) there is no contract containing a provision purporting to waive the Tribe Defendants' tribal immunity as to the claims asserted in this MUFTA Adversary Proceeding.

In addition to these undisputed facts, the Litigation Trustee asserts that certain conduct of the Tribe Defendants establishes that the Tribe Defendants exerted complete dominion and control of the Debtors, used the Debtors as their agents in connection with the fraudulent transfers alleged in this Adversary Proceeding and directed the Debtors to initiate the underlying Bankruptcy proceedings in order to forestall an action by the Michigan Gaming Control

Board ("MGCB") against the Tribe Defendants, thereby becoming one with the Debtors under principles of agency and alter ego/piercing the corporate veil. While the Tribe Defendants do not concede the truth of these allegations they do accept them, as did Judge Shapero, solely for purposes of resolving the legal waiver issues presented in this appeal. Judge Shapero accepted "as true," and so does this Court in reviewing his Opinion and Order, that "the Tribe Defendants' pre-petition and post-petition conduct as relates to the Debtors amounts to pervasive dominion and control and went well beyond filing proofs of claim or other litigation conduct." (*In re Greektown Holdings*, 559 B.R. at 852-53.)

II. JURISDICTION AND STANDARD OF REVIEW

The parties do not dispute this Court's jurisdiction to entertain the Litigation Trustee's appeal. Under 28 U.S.C. § 158(a)(1), this Court has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by the Bankruptcy Court. Judge Shapero's Order granting the Tribe Defendants' Motion to Dismiss results in the Bankruptcy Court's dismissal of the remaining Defendants in the underlying Adversary Proceeding. In a separate Opinion and Order issued this same day, the Court addresses an appeal of the Bankruptcy Court's earlier dismissal of the Papas and Gatzaros Defendants. A ruling on a motion to dismiss a bankruptcy court adversary proceeding is reviewed *de novo*. *In re Grenier*, 430 B.R. 446, 449 (E.D. Mich. 2010) (citing *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

The Tribe moves under Fed. R. Civ. P. 12(b)(1) to dismiss the Complaint in the Adversary Proceeding for lack of subject matter jurisdiction based on sover-

eign immunity. *See Memphis Biofuels*, 585 F.3d at 919-20 (noting that a motion to dismiss on the basis of sovereign immunity tests the Court's subject matter jurisdiction to entertain the action). The party invoking federal subject matter jurisdiction, here the Litigation Trustee, bears the burden of proving it. *Dismas Charities, Inc. v. U.S. Dept of Justice*, 401 F.3d 666, 671 (6th Cir. 2005); *3D Systems, Inc. v. Envisiontec, Inc.*, 575 F. Supp. 2d 799, 803 (E.D. Mich. 2008) (observing that plaintiff bears the burden of proving jurisdiction in order to defeat a motion by defendant challenging the court's subject matter jurisdiction).

Challenges to subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) "come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). Under a facial attack, all of the allegations in the complaint must be taken as true, much as with a Rule 12(b)(6) motion. *Gentek*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). Under a factual attack, however, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction. "Where . . . there is a factual attack on the subject-matter jurisdiction alleged in the complaint, no presumptive truthfulness applies to the allegations" and "the district court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts." *Id.*

III. ANALYSIS

Counsel for the Litigation Trustee succinctly stated at the April 10, 2017 hearing the "issue of first impression" presented in this appeal: whether prin-

ciples of alter-ego/piercing the corporate veil and/or agency can be applied to find a waiver by conduct of an Indian tribe's sovereign immunity. The Litigation Trustee submits that the Debtors in the underlying Greektown bankruptcy proceedings were the "mere instrumentalities" of the Tribe Defendants, and were "dominated and controlled" by the Tribe Defendants both before and after the bankruptcy filings and used by the Tribe Defendants to initiate the Greektown bankruptcy proceedings to avoid an action by the MGCB to force the Tribe Defendants to relinquish their interest in Greektown Casino. The Tribe Defendants, and Judge Shapero, accepted as true, solely for purposes of determining the legal issue of whether the Tribe Defendants could be found to have waived their tribal immunity under an alter ego or agency theory, the facts and inferences alleged by the Litigation Trustee regarding the Tribe Defendants' domination and control over the Debtors. The Tribe Defendants submit that, as a matter of law, even assuming the veracity of the allegations that they "dominated and controlled" the Debtors, they cannot be deemed to have waived their sovereign immunity based upon such conduct.

A. *Memphis Biofuels* Applies Here and Supports Judge Shapero's Finding of No Waiver

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Tribal sovereign immunity is a matter of common law, a judicially created doctrine, not deriving from the Eleventh Amendment or an act of Congress. *Id.* at 756, 118 S.Ct. 1700. "[A] tribe may

choose to expressly waive its tribal-sovereign immunity either in its charter or by agreement." *Memphis Biofuels*, 585 F.3d at 921 (citing *Kiowa*, 523 U.S. at 754, 118 S.Ct. 1700). In *Memphis Biofuels*, the tribe's charter (like the Tribal Code here) required board approval to effect a waiver of sovereign immunity. 585 F.3d at 921. Although the parties had signed a contractual waiver provision by which both parties waived all immunities, and plaintiff believed that the Chickasaw Nation had obtained the requisite board approval, in fact no board approval had been obtained. 585 F.3d at 922. Despite the written waiver signed by the parties, the Sixth Circuit held that "regardless what MBF may have thought, board approval was not obtained, and CNI's charter controls . . . . [and] without board approval, CNI's sovereign immunity remains intact." *Id.* The Sixth Circuit refused to apply equitable doctrines to find waiver based on the parties' written agreement that expressly granted waiver, holding that "unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity." *Id.* The Sixth Circuit concluded that the tribe's "charter controls, and, without board approval, the waiver agreement is insufficient." *Id.* The Sixth Circuit observed that:

> This result may seem unfair, but that is the reality of sovereign immunity: "[I]mmunity can harm those who . . . are dealing with a tribe. . . . These considerations might suggest a need to abrogate tribal immunity, [but] . . . we defer to the role Congress may wish to exercise in this important judgment.

585 F.3d at 922 (alterations and ellipsis in original).

As Judge Shapero correctly noted, in this case it is undisputed that the Tribe Defendants' Tribal

Code and Charter required a narrowly tailored board resolution specifically waiving sovereign immunity for an identified limited purpose. It is also undisputed that no such board resolutions were ever adopted. 559 B.R. at 845-46. It is also undisputed that the Tribe Defendants never entered into any contract as relevant here that contained any provision purporting to waive sovereign immunity, conduct that could arguably fall within the waiver provision contained in Section 44.108 of the Tribal Code. *Id.* at 846.

This would seem to end the matter given the clear line adopted by the Sixth Circuit in *Memphis Biofuels*. However, the Litigation Trustee suggests *Memphis Biofuels* applies only to contractual waivers of sovereign immunity in the absence of a duly authorized tribal board resolution. (ECF No. 9, Appellant's Br. 21.) The Litigation Trustee argues that in *Memphis Biofuels*, the Sixth Circuit was simply unwilling to apply equitable quasi-contractual remedies where the parties were fully capable of obtaining the required tribal resolution before proceeding with a contractual agreement. (*Id.* at 25-27.) Here by contrast, the Litigation Trustee urges, where the MUFTA claims sound in tort, not contract, the Plaintiff could not possibly obtain and perfect tribal board resolution, and "*Memphis Biofuels* is simply inapplicable." (*Id.* at 27.) The Court disagrees.

Importantly, the Litigation Trustee has not cited a single case that makes this contract/tort distinction in analyzing a waiver of the sovereign immunity of an Indian tribe. *Memphis Biofuels* makes no such distinction, nor do the cases relied upon by the Sixth Circuit in that case which also broadly hold that a waiver of tribal sovereign immunity must be clear and unequivocal and cannot be implied from conduct.

For example, in *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), discussed at some length by the Sixth Circuit in *Memphis Biofuels*, the court held that no waiver of tribal sovereign immunity as to a discrimination claim under the Rehabilitation Act could be implied based upon the tribe's conduct in accepting federal funds. In *Sanderlin*, as here, the tribe's governing ordinance expressly required a duly-enacted tribal council resolution to effect a waiver of the tribe's sovereign immunity. The Court reasoned that even if the tribe had implicitly promised not to discriminate in exchange for receiving federal funds, such conduct would "in no way constitute an express and unequivocal waiver of sovereign immunity and consent to be sued." 243 F.3d at 1289. Nor was the court willing to apply agency principles of actual or apparent authority to find waiver of "a Native American tribe's assertion of sovereign immunity" with respect to plaintiff's discrimination claim. *Id.* at 1288. The Eleventh Circuit observed and adhered to the Supreme Court's "plain" directive that "waivers of tribal sovereign cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Id.* at 1286.

The Sixth Circuit in *Memphis Biofuels*, like the Eleventh Circuit in *Sanderlin*, expressly declined to apply equitable doctrines such as apparent authority to find a waiver of tribal immunity and adhered instead to Supreme Court precedent dictating that tribal sovereign immunity cannot be waived (and particularly in the face of a tribal charter that specifically describes the means by which the tribe's immunity can be waived) without clear and express language effecting that waiver. Although *Memphis*

Biofuels was a case sounding in contract, not tort, the Sixth Circuit did not mention and therefore gave no import to such a distinction. Nor did the cases on which the Sixth Circuit relied in *Memphis Biofuels*, similarly rejecting such implied waiver, suggest the significance of such a distinction.

In *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012), the Eleventh Circuit relied on *Sanderlin* in a tort case and refused to find that an Indian tribe had waived its sovereign immunity to a wrongful death claim through its conduct in applying for a state liquor license. The court refused to find an implied waiver of tribal immunity in an action against the tribe for over-serving alcohol to a young woman in violation of state dram shop laws, resulting in her tragic death in an automobile accident. Relying on some of the same cases cited by the Sixth Circuit in *Memphis Biofuels* the Eleventh Circuit reasoned:

> Also without merit is Furry's claim that the Miccosukee Tribe waived its immunity from private tort actions by applying for a state liquor license. As we have recognized on many occasions, "[t]he Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Sanderlin [v. Seminole Tribe of Florida*, 243 F.3d 1282] at 1286 [(11th Cir. 2001)] (quoting *[Florida v.] Seminole Tribe [of Fla.]*, 181 F.3d [1237] at 1243 [(11th Cir. 1999)]); *see Santa Clara Pueblo [v. Martinez]*, 436 U.S. [49] at 58 [98 S.Ct. 1670, 56 L.Ed.2d 106] [(1978)] (noting that waivers of sovereign immunity 'cannot be implied but must be unequivocally expressed' . . . a contrary conclusion would

> be 'no more than a misuse of the word 'express,' defined as '[m]anifested by direct and appropriate language, as distinguished from that which is inferred by conduct.')

685 F.3d at 1235.

The Litigation Trustee fails to support its contract/tort distinction with any persuasive authority and admits that it can point to no "direct and appropriate [waiver] language," as distinguished from conduct, in this case. A tribal board resolution waiving the Tribe Defendants' immunity to suit based on the claims asserted in this MUFTA Adversary Proceeding was required by the Tribe Defendants' Tribal Code and one was not obtained. The Litigation Trustee offers no persuasive authority for adopting a bright-line rule distinguishing cases sounding in contract from cases sounding in tort when analyzing a waiver of tribal immunity. This Court is cognizant of the fact that continued adherence to the extreme breadth of an Indian tribe's sovereign immunity has been questioned, both by the Supreme Court and the Sixth Circuit and other courts interpreting Supreme Court mandate. As the Sixth Circuit remarked in finding no waiver in *Memphis Biofuels*: "This result may seem unfair, but that is the reality of sovereign immunity: '[I]mmunity can harm those who . . . are dealing with a tribe. . . . These considerations might suggest a need to abrogate tribal immunity, [but] . . . we defer to the role Congress may wish to exercise in this important judgment.'" *Memphis Biofuels*, 585 F.3d at 922 (quoting *Kiowa*, 523 U.S. at 758, 118 S.Ct. 1700). The Eleventh Circuit expressed a similar sentiment in *Furry* in upholding tribal immunity:

> Cobbling together a new exception to tribal immunity would directly conflict with the

> Supreme Court's straightforward doctrinal statement, repeatedly reiterated in the holdings of this Circuit, that an Indian tribe is subject to suit in state or federal court "*only where* Congress has authorized the suit or the tribe has waived its immunity." . . . Waiver . . . occurs when the tribe itself consents to the jurisdiction of the state or federal courts, through for example, a provision in a commercial contract. Moreover, both abrogation and waiver require the use of express and unmistakably clear *language* by either Congress or the tribe. . . .
>
> * * *
>
> The doctrine of tribal sovereign immunity may well be anachronistic and overbroad in its application, especially when applied to shield from suit even the most sophisticated enterprises of Indian tribes, including commercial activities—such as the sale of alcohol—that have obvious and substantial impacts on non-tribal parties. But it remains the law of the land until Congress or the Supreme Court tells us otherwise.

685 F.3d at 1236-37 (second emphasis added). These cases cast significant doubt on the validity of the bright-line contract/tort distinction that the Litigation Trustee asks this Court to draw. The Court therefore rejects the Litigation Trustee's blanket proposition that *Memphis Biofuels* simply "does not apply here" and finds that *Memphis Biofuels* does apply here and supports Judge Shapero's finding of no waiver in the absence of a board resolution expressly waiving immunity with respect to the fraudulent conveyance claims asserted against the Tribe Defendants in this Adversary Proceeding.

B. Even Assuming a Limited "Waiver by Litigation Conduct" Has Been Recognized and Applied to Indian Tribes, the Only Litigation Conduct Attributable to the Tribe Defendants Here Would Not Support a Finding of Waiver With Respect to the Claims Asserted in This MUFTA Adversary Proceeding.

The Litigation Trustee insists that *Memphis Biofuels* cannot stand for the hard and fast proposition proffered by the Tribe Defendants, i.e. that *only* a duly adopted board resolution (where one is required by the tribal charter) will be sufficient to effect a waiver of tribal sovereign immunity, in light of Supreme Court precedent recognizing a limited waiver of sovereign immunity based on "litigation conduct." The Litigation Trustee argues that the Tribe Defendants have waived their sovereign immunity to the claims asserted against them in this MUFTA adversary proceeding, by their affirmative conduct in filing proofs of claim, appearances, and objections in the underlying bankruptcy proceeding and by operating as the alter ego of the Debtors and causing the Debtors to file the underlying bankruptcy petition. The Court disagrees.

1. Judge Shapero correctly concluded that "[t]he Tribe Defendants' participation in the claims allowance and confirmation processes has not, as a matter of law, constituted a waiver of sovereign immunity that is broad enough to encompass this entire adversary proceeding against them, which seeks to recover alleged fraudulent transfers."

The Litigation Trustee asserts that, like States, the Tribe waives its sovereign immunity when it takes

the affirmative step of filing a claim (here proofs of claim in the bankruptcy proceeding) in court. There is ample support for the Litigation Trustee's assertion that a *State* may waive its sovereign immunity when it files a proof of claim in a bankruptcy proceeding. *Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 91 L.Ed. 504 (1947) ("It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . [and] [w]hen the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.") (alterations added). It is equally well established that such waiver is limited to a very narrow set of circumstances. *See*, *e.g.*, *In re Rogers*, 212 B.R. 265, 276 (E.D. Mich. 1997) ("Relying on *Gardner*, the Court finds that the MESA has not consented to this preference action because resolution of the preference action is not part of adjudicating the proofs of claim that the MESA filed. . . . A different result would transform MESA's proofs of claim into a lawsuit against the MESA which seeks a monetary judgment from the State treasury over and above the resolution of the proofs of claim.").

The Tribe asserts that the waiver by litigation conduct rule, which the Tribe acknowledges has been applied to defeat a State's assertion of Eleventh Amendment sovereign immunity in certain limited circumstances, is wholly inapplicable to Indian Tribes. The Tribe relies on *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), in which the Supreme Court established that an Indian tribe possesses immunity from a direct action

against it and also possesses immunity from cross-claims against it. However, there is authority to support the argument that a narrow recoupment exception could apply to Indian tribes. *See*, *e.g.*, *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982) (finding that tribe waived sovereign immunity by filing suit but the waiver was limited to adjudicating claims for "recoupment—arising out of the same transaction or occurrence which is the subject matter of the [tribe's] suit . . . but the [tribe] does not waive immunity as to claims which do not meet the 'same transaction or occurrence test' nor to claims of a different form or nature than that sought by it as plaintiff.").

Thus, even assuming that the Tribe Defendants could be held subject to the "waiver by litigation conduct" rule based upon their filing proofs of claim, appearance, and objections (each of which expressly denied waiver and reserved the Tribe Defendants' rights to assert the defense of sovereign immunity) in the underlying bankruptcy proceeding, the law is clear that such waiver would be limited to adjudication of the matters raised by its proofs of claim.

The Litigation Trustee does not appear to disagree with this limiting principle, conceding at the hearing before Judge Shapero the following:

> Where a tribe files a simple proof of claim we would agree. As a general rule the filing of the proof of claim, or even initiation of an adversary proceeding is a limited waiver of immunity and only with respect to that claim or that—the affirmative allegations alleged by the tribe in the adversary proceeding, not counter claims itself. As I said before, may be set off or recoupment claims.

(Bankr. ECF No. 742, Transcript of January 14, 2016 Hearing on Tribe Defendants' Motion to Dismiss at 24:22-25:3.)

Thus, it is agreed that any limited waiver that arguably would flow from the Tribe Defendants' actual conduct/participation in the underlying Bankruptcy proceeding would not encompass a waiver of immunity to the claims asserted in this Adversary Proceeding. Accordingly, the Litigation Trustee is forced to rely on the conduct of the Debtors, which brings us to the heart of this appeal. Counsel for the Litigation Trustee explained at the hearing before Judge Shapero that

> [g]enerally the filing of a proof of claim in a bankruptcy case waives immunity only with respect to the claims that arise from that proof of claim. . . . And the tribe Defendant[s] filed a proof of claim and the application for an administrative expense and—and so they put these in issue[].
>
> But as we said back in 2010 and have consistently said, this case is not simply about the tribe defendants' filed proof of claim or their application for rounds [sic] of administrative expense claim. We have always asserted that the tribe defendants' pervasive involvement in the events leading up to and after the bankruptcy filings go beyond the simple act of filing proofs of claim. . . . It's the filing of the bankruptcies themselves. The events leading up to that absolutely. But the filing of the case itself, not just in the proof of claim, but the filing of the overarching umbrella that is this bankruptcy case.

(Bankr. ECF No. 742, 1/14/16 Hr'g Tr. 22:19-23:5; 23:25-24:3.)

Of course the Tribe Defendants are not among the Debtors in the underlying bankruptcy proceedings; the Tribe Defendants did not initiate "the overarching umbrella that is this bankruptcy case." And so, to even proceed on the theory that filing the "overarching" bankruptcy case would amount to a waiver as to these MUFTA claims under the limited doctrine of "waiver by litigation" discussed in the cases cited *supra*, the Litigation Trustee is forced to rely on equitable principles of alter-ego/veil piercing and/or agency to attribute the conduct of the Debtors to the Tribe Defendants:

> The—the conduct of the debtors should be applied to the tribe defendants. . . . [B]y filing the case [the Tribe Defendants] have essentially embraced all of the actions that can be brought under that case, that's right. . . . [I]f they're willing to stipulate to that, you know, we'll ride that—that's—we'll ride that horse. I don't think we need the alter ego or piercing the corporate veil issues. . . . But if the tribe is unwilling to stipulate that they initiated the bankruptcy cases, we have to establish that conduct in an alternative way. And that is by establishing the debtors were the alter ego of the tribe defendants or that the defendants—or the debtors' corporate veil should be pierced. Because then for all intents and purposes the tribe is the debtor. The conduct of the debtor is the conduct of the tribe, it's one. It's not implicit, it's not by implication, it is their conduct.

(Bankr. ECF No. 742, 1/14/16 Hr'g Tr. 23:19-21, 26:11-27:2.)

2. No court has ever applied the equitable doctrine of alter-ego/veil piercing to find a waiver of an Indian tribe's sovereign immunity and Supreme Court precedent precludes this Court from creating such a doctrine which necessarily finds an implied waiver by conduct.

Success on this theory requires a finding that the Tribe Defendants' conduct in allegedly controlling the Debtors and causing the Debtors to initiate the underlying bankruptcy proceedings amounts to a waiver of the Tribe Defendants' sovereign immunity to the fraudulent transfer claims at issue in this Adversary Proceeding. The Litigation Trustee would like the Court to reach this finding of waiver through two distinct analytical steps: first, find that the Tribe Defendants exerted such dominion and control over the Debtors that the conduct of the Debtors could be attributed to the Tribe Defendants under equitable principles of agency/alter-ego/veil piercing (the Tribe Defendants concede this for purposes of this appeal), and second, find that because the two are one, the Tribe Defendants did in fact file the underlying bankruptcy proceedings, thereby waiving their sovereign immunity as to all claims (including the avoidance claims alleged in this Adversary Proceeding) asserted as part of those underlying proceedings. The Litigation Trustee submits that if "Plaintiff were successful in establishing that the Debtors were the alter egos of the Tribe Defendants such that their respective corporate veils should be pierced, the Tribe Defendants' sovereign immunity is waived by operation of law, not by implication." (Appellant's Br. 31.)

But even assuming without deciding that filing the underlying bankruptcy proceeding would be sufficient affirmative conduct on the part of the Tribe Defendants to clearly and unequivocally express their intent to waive their sovereign immunity to the fraudulent transfer claims at issue in this Adversary Proceeding (a claim that the Tribe Defendants contest), the Court must necessarily apply an equitable doctrine attributing legal significance to the Tribe Defendants' alleged conduct in controlling the Debtors, and then rely on that imputed conduct, to conclude that the Tribe Defendants unequivocally and clearly expressed their desire to waive their sovereign immunity to the claims asserted against them in this Adversary Proceeding. In urging the Court to adopt this admittedly unprecedented approach to waiver of sovereign tribal immunity, the Litigation Trustee relies principally on three cases: *Warburton/Buttner v. Superior Court of San Diego*, 103 Cal. App. 4th 1170, 127 Cal.Rptr.2d 706 (Cal. Ct. App. 2002); *Private Solutions, Inc. v. SCMC, LLC*, No. 15-3241, 2016 U.S. Dist. LEXIS 88190 (D.N.J. July 6, 2016); and *United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma*, No. 09-730, 2010 WL 597125 (W.D. Okla. Feb. 16, 2010).

Private Solutions is easily disposed of as persuasive here because that case simply addressed the issue, admittedly not present here, of whether the defendant limited liability company was an arm of the tribe and therefore able to enjoy the tribe's sovereign immunity. 2016 U.S. Dist. LEXIS 88190, at *5. The court concluded that the record was insufficient to permit a determination as to whether the corporate defendant's parent company was an economic subordinate entity entitled to enjoy tribal immunity. *Id.* at

*9. The case did not address the issue of whether an Indian tribe could be held to have waived its sovereign immunity based on a finding of alter ego.

United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma is similarly unpersuasive as the issue there was whether a tribal entity that was the economic subordinate of another tribal entity could waive the sovereign immunity of its "parent" entity by waiving its own sovereign immunity. The court held that a waiver by a subordinate economic entity does not operate as a waiver of the sovereign immunity of the tribe. 2011 WL 308889, at *4 (W.D. Okla. Jan. 26, 2011). No such issue is presented here.

Warburton merits some discussion given some factual similarities to *Memphis Biofuels*. As the Litigation Trustee states in its principal brief on appeal, the court in *Warburton* "considered an issue identical to the issue presented in *Memphis Biofuels* . . . namely the effectiveness of a contractual waiver of sovereign immunity in the absence of a formal tribal resolution." (ECF No. 9, Appellant's Br. 31-32.) In *Warburton*, an agreement between Warburton and Defendant FNC, LLC (a limited liability company formed under the laws of Delaware that was 50%—and later 100%—owned by Tunica–Biloxi tribe), contained a clause waiving the sovereign immunity of the tribe in any action brought by Warburton against FNC. 103 Cal. App. 4th at 1175, 127 Cal.Rptr.2d 706. That provision, however, was stricken out by interlineation pending the final tribal council approval and a formal board resolution. The formal tribal resolution was never forthcoming. *Id.* at 1176-77, 127 Cal.Rptr.2d 706. Despite the absence of a formal board resolution, Warburton sought to establish that the tribe, as a member of FNC, waived

its sovereign immunity under a theory of common law alter ego liability. *Id.* at 1190, 127 Cal.Rptr.2d 706. The agreement between Warburton and FNC also contained the following language regarding tribal immunity: "Because it may be determined by a court of competent jurisdiction that First Nation is a tribally controlled entity, [the tribe] hereby agrees that it will not assert its Tribal Immunity in any action brought by [Warburton] to enforce any or all provisions of this agreement." 103 Cal. App. 4th at 1184, 127 Cal.Rptr.2d 706 (alterations in original). The agreement further stated that the anticipated (but never executed) tribal resolution waiving the tribe's sovereign immunity in any action brought by Warburton against FNC was "not intended as an admission by [Warburton] that First Nation enjoys the . . . Tribe's sovereign immunity." *Id.* The court in *Warburton* interpreted this language as "showing the anticipated separateness of First Nation and the Tribe that was allegedly fraudulently disregarded, giving rise to the alter ego allegations." *Id.* Thus, despite the absence of a formal tribal board resolution, the court in *Warburton* was persuaded to consider whether FNC was actually a tribal controlled entity so that the court could give effect to the language of the agreement between Warburton and FNC that Warburton did not accept that FNC would enjoy the tribe's sovereign immunity. *Id.* at 1185, 127 Cal.Rptr.2d 706.

There are certainly facts that distinguish *Warburton* from this case. But the most significant, and dispositive, problem with the Litigation Trustee's reliance on *Warburton* is that the *Warburton* court reached a result, *i.e.* that the plaintiff was entitled to discovery on an alter ego theory of liability against

the tribe "despite the admitted lack of a formal resolution," (*see* 103 Cal. App. 4th at 1189, 127 Cal.Rptr.2d 706), that directly conflicts with the Sixth Circuit's holding in *Memphis Biofuels*, i.e. that regardless of a written agreement purporting to waive sovereign immunity, where a tribal charter requires board approval, an express waiver of immunity will not be found absent a formal board resolution. 585 F.3d at 922-23. The Sixth Circuit would not have reached the alter ego issue presented in *Warburton* because it would never have proceeded beyond a determination that in the absence of a formal board resolution waiving immunity, no waiver could be found in the parties' agreements (written or otherwise). *Warburton* allowed for a possibility that the Sixth Circuit explicitly foreclosed in *Memphis Biofuels*: that "waiver [could be] permissibly accomplished through contract," despite the absence of the required formal board resolution. 103 Cal. App. 4th at 1190, 127 Cal.Rptr.2d 706.

"The alter ego doctrine is equitable in nature." *Bucyrus-Erie Co. v. Gen'l Pdcts. Corp.*, 643 F.2d 413, 421 (6th Cir. 1981). The Sixth Circuit in *Memphis Biofuels* expressly declined to apply an equitable doctrine, apparent authority, to circumvent the requirement of a duly adopted board resolution waiving immunity. The Litigation Trustee offers no persuasive authority suggesting that the Sixth Circuit would ignore *Memphis Biofuels* and apply an equitable doctrine here to defeat tribal immunity in the absence of sufficiently express board action. This Court declines to adopt such an unprecedented theory of waiver of tribal immunity in reliance on *Warburton*, a California state case, in view of *Memphis Biofuels*, binding Sixth Circuit precedent

that the Sixth Circuit has never disavowed. The Sixth Circuit declined to apply equitable principles in *Memphis Biofuels* to defeat tribal sovereign immunity, even recognizing the potential inherent unfairness of its decision but concluding it was bound by precedent to recognize the tribe's immunity. This Court is unconvinced that it would reach a different result here. *See also Stillaguamish Tribe of Indians v. Pilchuck Grp. II, LLC*, No. 10-995, 2011 WL 4001088, at *6, 7 (W.D. Wash. Sept. 7, 2011) (following *Memphis Biofuels* and holding that tribal law controls determination of waiver of tribal immunity, that "state law plays no role in deciding whether a Tribe has waived its sovereign immunity . . . and [that] where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions" refusing to apply principles of apparent authority and noting, as the Sixth Circuit did in *Memphis Biofuels*, that "[s]overeign immunity . . . is a doctrine whose application frequently leads to unfair results"); *MM & A Productions, LLC v. Yavapai-Apache Nation*, 316 P.3d 1248, 1253, 234 Ariz. 60 (Ariz. Ct. App. Div. 2, 2014) ("[W]e agree with cases such as *Memphis Biofuels, Native American Distributing*, and *World Touch* that it would be inconsistent with United States Supreme Court precedent to apply equitable principles such as apparent authority to defeat a sovereign's immunity from suit.").

3. The FSIA cases do not provide a basis for finding a waiver of tribal sovereign immunity.

In a final attempt to apply alter-ego/veil piercing concepts to deny the Tribe Defendants immunity here, the Litigation Trustee relies on cases in which federal courts have applied alter-ego theories to find

waiver of immunity by a foreign sovereign under the Foreign Sovereign Immunities Act ("FSIA"). *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 633-34, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (discussing the purpose and history of the FSIA and applying "internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law" and disregarding the separate juridical status of a foreign government's instrumentality); *Transamerica Leasing, Inc. v. La Republica De Venezuela*, 200 F.3d 843, 849-50 (D.C. Cir. 2000) (applying principles of agency to determine whether the acts of a foreign owned corporation were attributable to the foreign sovereign). The FSIA, however, invites such analysis by explicitly providing for waiver by implication: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity *either explicitly or by implication*." 28 U.S.C. § 1605(a)(1) (emphasis added). Thus, the FSIA expressly allows for that which the Supreme Court forbids in the case of Indian tribes—waiver by implication. The FSIA cases are inapt to the issue before this Court regarding the very unique brand of sovereign immunity enjoyed by Indian Tribes. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047-48 (9th Cir. 2006) (refusing to apply the FSIA by analogy to an Indian tribe, noting that to do so would contravene Supreme Court precedent allowing no implied waiver in the case of Indian tribes).

IV. CONCLUSION

As the Litigation Trustee concedes, this appeal presents an issue of first impression as neither the parties nor the Court has unearthed a case in which a court has applied the equitable doctrines of alter-ego/veil piercing and/or agency to find that an Indian tribe waived its sovereign immunity. In the absence of a different directive from Congress or the Supreme Court or the Sixth Circuit limiting the breadth of tribal immunity, this Court is constrained to reject the Litigation Trustee's novel theory of implied waiver. The touchstone of the theory is the alleged conduct of the Tribe Defendants in controlling the Debtors and allegedly forcing the Debtors to initiate the underlying bankruptcy proceedings. This conduct, regardless of how the Litigation Trustee spins the theory, is the sole basis for implying a waiver that was not expressed through the required formal board resolution unequivocally consenting to suit on these MUFTA claims.

There is no evidence in this case of clear express language, unequivocally stating the Tribe Defendants' intent to consent to the filing of these MUFTA claims against them. It is difficult to see how, in light of the admonition that any waiver of tribal sovereign immunity "cannot be implied and must be unequivocally expressed," *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670, and that such an expression must manifest the tribe's intent in "clear" and "unmistakable" terms, *Potawatomi*, 498 U.S. at 509, 111 S.Ct. 905, this Court can blaze a new trail and find a waiver of tribal immunity based upon theories of alter ego and veil piercing, doctrines that are equitable in nature and necessarily require a finding of liability by implication. "The doctrine of tribal

sovereign immunity may well be anachronistic and overbroad in its application. . . . But it remains the law of the land until Congress or the Supreme Court tells us otherwise." *Furry*, 685 F.3d at 1236-37. As the Sixth Circuit and many other courts have noted, often this may not seem to lead to a fair result, but this Court is bound to apply the law, not change it.

For the foregoing reasons, the Court AFFIRMS the September 29, 2016 Opinion and Order of the Bankruptcy Court GRANTING the Tribe Defendants' Motion to Dismiss and DISMISSING the Tribe Defendants WITH PREJUDICE from the Adversary Proceeding.

IT IS SO ORDERED.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 08-53104 Jointly Administered
Adv. Pro. 10-05712

IN RE: GREEKTOWN HOLDINGS, LLC, ET AL.,[1]
Debtors,

BUCHWALD CAPITAL ADVISORS, LLC,
SOLELY IN ITS CAPACITY AS LITIGATION TRUSTEE
FOR THE GREEKTOWN LITIGATION TRUST,
Plaintiff,

v.

DIMITRIOS ("JIM") PAPAS, ET AL.,
Defendants.

[Signed September 29, 2016]

OPINION ON REMANDED SOVEREIGN IMMUNITY WAIVER ISSUE (DKT. 649)

Walter Shapero, United States Bankruptcy Judge

INTRODUCTION AND BACKGROUND

The Litigation Trustee ("Plaintiff") by this adversary proceeding essentially seeks to avoid aspects of

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[1] The debtors in the jointly administered cases include Greektown Holdings, LLC; Greektown Casino, LLC; Kewadin Greektown Casino, LLC; Monroe Partners, LLC; Greektown Holdings II, Inc.; Contract Builders Corporation; Realty Equity Company Inc.; and Trappers GC Partner, LLC (together, "Debtors").

a restructuring and financing transaction whereby Greektown Holdings, LLC, a Debtor, directly or indirectly transferred money to multiple parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Kewadin Casinos Gaming Authority (together, "the Tribe Defendants").[2] Plaintiff brought this fraudulent transfer action under 11 U.S.C. §§ 544 and 550, incorporating Mich. Comp. Laws §§ 566.34 and 566.35. This Opinion follows the District Court's Opinion, *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015) reversing this Court's Opinion at 516 B.R. 462 (Bankr. E.D. Mich. 2014). This Court had concluded that 11 U.S.C. § 106(a) abrogated the Tribe Defendants' sovereign immunity, but the District Court (a) reversed on appeal finding that the statute does not thereby waive tribal sovereign immunity; and (b) remanded the case for further proceedings relative to whether or not the Tribe Defendants had waived sovereign immunity.

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[2] In an order entered on June 13, 2008 in the main Chapter 11 case (Case No. 0853104, Dkt. 114), these several bankruptcies were consolidated for procedural purposes only and became jointly administered. In an order entered on April 22, 2010 in the main Chapter 11 case (Dkt. 2279), the Court granted the Official Committee of Unsecured Creditors ("Committee") authority to pursue bond avoidance claims on behalf of Greektown Holdings, LLC. In accordance with that order, the Committee initiated this adversary proceeding on May 28, 2010. Through a consent order entered in this adversary proceeding on August 14, 2010 (Adv. Pro. No. 10-05712, Dkt. 64), Buchwald Capital Advisors, LLC, solely in its capacity as Litigation Trustee for The Greektown Litigation Trust, substituted in for the Committee, and thereafter has prosecuted this action.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(H). The Court has jurisdiction under 28 U.S.C. § 1334(b) and E.D. Mich. L.B.R. 83.50(a).

MOTION TO DISMISS STANDARD

Fed.R.Bankr.P. 7012 incorporates Fed.R.Civ.P. 12(b)(1) and provides that a party may by motion assert the defense of lack of subject-matter jurisdiction. The Court must assume that the allegations in Plaintiff's complaint are true and Plaintiff bears the burden of proving jurisdiction in order to survive a motion to dismiss. *3D Sys., Inc. v. Envisiontec, Inc.*, 575 F.Supp.2d 799, 802-03 (E.D. Mich. 2008).

DISCUSSION

I. The Parties' Arguments

The Tribe Defendants base their argument on precedent stating that "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). This Opinion deals with what constitutes a "clear waiver by the tribe". The Tribe Defendants' initial argument is that the indicated clear waiver may only be accomplished by the required passage of duly adopted resolutions by the boards governing each of the Tribe Defendants.[3] It is undisputed that no such resolutions

[3] To be more specific and to summarize the pertinent authorities, the Sault Ste. Marie Tribe of Chippewa Indians ("Tribe") has a Board of Directors, as established by the Tribe's Constitution. Chapter 44 of the Tribal Code expressly reaffirms the Tribe's sovereign immunity from suit, unless waived under specific provisions of that Chapter, to wit: (a) by resolution of the Tribe's Board of Directors expressly waiving the Tribe's

were ever adopted. Further, it is also an undisputed fact that the Tribe Defendants never entered into any contract containing provisions purporting to waive sovereign immunity.

Plaintiff responds arguing that, notwithstanding the lack of enacted resolutions, the Tribe Defendants can and should be seen as having waived their sovereign immunity by virtue of their conduct in, or incident to, these bankruptcy and related proceedings, as well as the involved underlying business transactions. Specifically that alleged conduct involves the Tribe Defendants having pervasive involvement in the events leading up to and after the Debtors' bankruptcy filings, including the Tribe Defendants doing the following: (a) intermingling the functions of the various tribal and non-tribal parties in carrying out the Debtors' business; (b) utilizing the Debtors as their agents and causing the Debtors to make the alleged fraudulent transfers; (c) directing the Debtors

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sovereign immunity and consenting to suit; (b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specifically by resolution of the Tribe's Board of Directors; or (c) for any claim "sounding in contract" arising from an express, written, and signed contract involving the performance of a proprietary function of the Tribe. As to the referred-to (b) and (c) criteria, no party alleges they are factually or legally pertinent, and the Court will not discuss those further. Kewadin Casinos Gaming Authority ("Authority") is a governmental instrumentality of the Tribe, as set forth in the Authority's charter and Chapter 94 of the Tribe's Tribal Code, which provides that the Tribe's Board of Directors grants irrevocable consent allowing the Authority's Management Board to waive the sovereign immunity of the Authority (but not that of the Tribe). The pertinent documents are attached as exhibits to the Tribe Defendants' Motion to Dismiss (Dkt. 649). The authenticity of these documents is not disputed and they are properly considered part of the undisputed record for purposes of this motion.

to initiate their bankruptcy petitions; (d) dominating and controlling the Debtors, directing their post-petition litigation strategy, and sharing the same professionals; and (e) filing in the bankruptcy cases multiple proofs of claim, objections to plan confirmation, and an application for allowance of administrative expense claim. Based on these facts and events, Plaintiff argues that (1) the Tribe Defendants should be considered as legally standing in the shoes of the Debtors as their equivalents via theories of alter ego, piercing the corporate veil, and/or agency; and (2) by reason of such, the Tribe Defendants thusly should be seen as having voluntarily waived their sovereign immunity. The questions presented thus are: (a) is appropriate and specific governing board action the *only* way the Tribe Defendants can waive their sovereign immunity; and (b) if not, and if waiver can be accomplished by conduct, was there such a waiver in the circumstances of this case?

II. Can the Tribe Defendants' Sovereign Immunity Be Waived Only by the Required Tribal Resolutions?

The Tribe Defendants rely principally on *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009), in which MBF, a non-tribal entity, entered into a transaction and contractual relationship with CNI, a tribally incorporated entity. That Court summarized the salient facts as follows:

> MBF recognized that, should a dispute arise, CNI might try to claim sovereign immunity. Thus, MBF insisted on a contractual provision expressly waiving any sovereign immunity and a "representation and warranty" that CNI's waiver was valid, enforceable, and effective. Throughout the negotiations, the parties exchanged draft versions

> of the agreement. On October 5, 2006, CNI forwarded MBF a draft of the agreement that CNI's in-house lawyers had reviewed and electronically edited. The edits included five separate comments; two of the comments addressed the sovereign-immunity waiver provision and said that CNI board approval was necessary to waive tribal-sovereign immunity. Ultimately, however, both parties signed the agreement, and the board did not waive immunity.

Id. at 918-19. After CNI repudiated the agreement and litigation arose, the Sixth Circuit opined that "a tribe may choose to expressly waive its tribal-sovereign immunity either in its charter or by agreement. Here, however, CNI did not make that choice. CNI's charter requires board approval to waive sovereign immunity." *Id.* at 921 (citation omitted). It further opined:

> In addition to the tribal charter, an agreement can validly waive tribal-sovereign immunity. Here, the parties agree that the board of directors did not pass a resolution waiving sovereign immunity. The parties did, however, sign a waiver provision whereby both parties waived all immunities. MBF believed that CNI obtained the required approval for this waiver provision—but regardless of what MBF may have thought, board approval was not obtained, and CNI's charter controls. In short, without board approval, CNI's sovereign immunity remains intact.

Id. at 922. The Sixth Circuit thus, and notwithstanding the specific contractual waiver of immunity provision, also dismissed separate additional arguments that CNI waived sovereign immunity based on equitable doctrines when it signed the untrue

representation that it waived sovereign immunity, reasoning and concluding that unauthorized acts of tribal officials are insufficient to waive sovereign immunity. *Id.*[4]

Memphis Biofuels is most relevant and applicable here and the Court is not persuaded by Plaintiff's attempts to distinguish it. Plaintiff first argues that its holding should be seen as applying only to *contractual* waivers, and not waivers *by conduct*, as Plaintiff argues occurred here. Contracts, by their nature, require mutuality of agreement. *Chires v. Cumulus Broad., LLC*, 543 F. Supp. 2d 712, 717 (E.D. Mich. 2008). On this point, one must first observe that if a specific contractual waiver cannot carry the day, one would be hard put to conclude as a matter of logic or law that *conduct*, which necessarily and by its very nature is or can be ambiguous, and in any event less directed, specific, or clear as a writing (and thus usually considered to be of somewhat lesser legal force and effect), might nevertheless carry the day. Every contract is in essence the culmination of some form of "conduct" (i.e. usually negotiation between and among its parties); the agreement being seen as the greater inclusive and embodiment of that process. If one conceives a specific agreement being, in essence, the form and result of conduct and/or an expression of conduct and intent put into definitive written terms, such agreement ought to be seen as in effect subsuming the possibility that something less than the written agreement, i.e. conduct that either

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[4] The case of *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp.2d 736, 746 (D. S.D. 2011) provides an example where the required tribal resolution was actually obtained, and sovereign immunity thus waived (reversed in part on other grounds, 747 F.3d 1020 (8th Cir. 2014)).

led to it or, in this case, conduct that did not lead to an agreement, might nevertheless produce a result that even the existence of a written agreement itself does not legally provide for or permit. In this context, we have the Sixth Circuit's clear statement that in addition to and notwithstanding the existence of such an agreement, an enabling resolution is required. The agreement situation in *Memphis Biofuels* cannot therefore be properly distinguished as mere "contract, rather than conduct." In fact, in that case, what CNI did (signed an express, written contract including a representation and warranty that CNI's waiver was valid, enforceable, and effective) was in essence the clearest, and most explicit form of "conduct" imaginable. Yet the Sixth Circuit still found that to be insufficient to waive sovereign immunity, given the tribal charter's specific requirement that such waiver be by tribal board resolution. If what CNI did (or failed to do) in *Memphis Biofuels* was insufficient to waive its sovereign immunity, what Plaintiff alleges the Tribe Defendants did should also be seen as insufficient. Therefore, what Plaintiff alleges, even taken as true on its face, is clearly and as a matter of law, of less legal import than the conduct in *Memphis Biofuels*, a case this Court deems to be binding, highly persuasive, and an independent basis for granting the Tribe Defendants' Motion to Dismiss.

The same conclusion is reinforced by *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), which was cited with approval by the Sixth Circuit in *Memphis Biofuels*, 585 F.3d at 922. There, the Seminole tribe had a similar provision requiring that waivers of sovereign immunity be accomplished by a council resolution. A former tribal employee filed a disability discrimination claim under a federal statute, but there had been no resolution waiving

sovereign immunity. He argued that the tribe's sovereign immunity had been abrogated because the tribe's chief signed an application for federal funds and the tribe received such funds on the specific promise that it comply with the subject nondiscrimination statute. The Eleventh Circuit opined:

> Chief Billie did not have actual or apparent authority to waive voluntarily the Tribe's sovereign immunity from Rehabilitation Act suits. Chief Billie did not somehow become vested with the power to waive that immunity simply because he had the actual or apparent authority to sign applications on behalf of the Tribe for federal funding. Such a finding would be directly contrary to the explicit provisions of the Tribal Constitution and Tribal Ordinance C-01-95 which expressly set forth how, when, through whom, and under what circumstances the Seminole Tribe may voluntarily waive its immunity. Not one of the Florida law cases cited by Sanderlin discusses agency principles as they might be applied to a Native American tribe's assertion of sovereign immunity in a lawsuit in a federal court arising under federal law. Extending authority to waive sovereign immunity to a single individual, at least in this context, would be directly contrary to the Supreme Court's clear statement that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)).

Id. at 1288. Insofar as Plaintiff here argues that there must be "conduct" and not simply "contract," such argument is disposed of by the fact that the

Seminole tribe actually received the federal funding, and that in itself can be considered as "conduct."

III. Plaintiff's "Waiver by Conduct" Arguments

Plaintiff argues that the Tribe Defendants waived their sovereign immunity by engaging in lengthy litigation in this Court and its other pre-petition and post-petition dealings with the Debtors. As noted, the Tribe Defendants, among other things, filed multiple proofs of claim in the bankruptcy cases, objected to plan confirmation, and filed an application for allowance of administrative expense claim. Plaintiff argues that *Memphis Biofuels* does not abrogate the "waiver by conduct" doctrine (sometimes referred to by the parties as "waiver by litigation"), and that the Tribe Defendants' conduct can nonetheless still waive their sovereign immunity. What is then at issue is the existence, scope, and extent of the Tribe Defendants' alleged waiver.

Case law indicates that when an Indian tribe initiates litigation, it does not necessarily waive its sovereign immunity altogether, but rather only for a certain limited purpose. Thus the Supreme Court held that an Indian tribe that filed suit seeking an injunction did not waive its sovereign immunity as to a counterclaim against it, and opined:

> Petitioner acknowledges that Indian tribes generally enjoy sovereign immunity, but argues that the Potawatomis waived their sovereign immunity by seeking an injunction against the Commission's proposed tax assessment. It argues that, to the extent that the Commission's counterclaims were "compulsory" under Federal Rule of Civil Procedure 13(a), the District Court did not need any independent jurisdictional basis to hear those claims.

> We rejected an identical contention over a half-century ago in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512, 60 S.Ct. 653, 655-656, 84 L.Ed. 894 (1940). In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. *Id.*, at 513, 60 S.Ct. at 656. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Ibid.* Oklahoma does not argue that it received congressional authorization to adjudicate a counterclaim against the Tribe, and the case is therefore controlled by *Fidelity & Guaranty*. We uphold the Court of Appeals' determination that the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509-10, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

Similarly, as to the issue of filing proofs of claim in a bankruptcy proceeding, "[t]he Supreme Court made clear in *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947), that when a sovereign files a claim against a debtor in bankruptcy, the sovereign waives immunity *with respect to adjudication of the claim*." *In re White*, 139 F.3d 1268, 1271 (9th Cir. 1998) (emphasis added) (tribal agency waived immunity, but only as to its claim, by objecting to

Chapter 11 plan confirmation and later filing a non-dischargeability action after case was converted to Chapter 7); *In re Diaz*, 647 F.3d 1073, 1087 (11th Cir. 2011) ("A state that files a proof of claim in a bankruptcy case does not thereby subject itself to any and all lawsuits that in any way might relate to the bankruptcy. Instead, an adversary action against the state must bear a direct relationship to the bankruptcy court's adjudication of the state's claim."). Plaintiff admits that a sovereign's filing of a proof of claim waives its sovereign immunity only with respect to claims arising from the same transaction or occurrence. *Pl. Response and Brief in Opp.*, Dkt. 668 at 20 (citing *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001) and *In re Charter Oak Associates*, 361 F.3d 760, 768 (2d Cir. 2004)).[5] Generally, an Indian tribe's participation in some manner of litigation is not a total waiver of sovereign immunity, but is instead limited. *See White v. Univ. of California*, 765 F.3d 1010, 1026 (9th Cir. 2014) (citations omitted)

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[5] On this point, it is worth noting that cases following this reasoning do so by relying on and discussing § 106(b) and (c), which provide:

> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

However, for whatever such may be worth, the law of this case is that Indian tribes are not "governmental units" for purposes of § 106. *In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D. Mich. 2015).

("Waiving immunity as to one particular issue does not operate as a general waiver. Thus, when a tribe files suit, it submits to jurisdiction only for purposes of adjudicating its claims, but not other matters, even if related."), *cert. denied*, —— U.S. ——, 136 S.Ct. 983, 194 L.Ed.2d 13 (2016); *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995) (tribal plaintiff who files § 523(a) nondischargeability action is subject to defendant's § 523(d) motion for attorney fees, which argued that tribal plaintiff's action was unjustified). The Tribe Defendants' participation in the claims allowance and confirmation processes has not, as a matter of law, constituted a waiver of sovereign immunity that is broad enough to encompass this entire adversary proceeding against them, which seeks to recover alleged fraudulent transfers.

Among other cases, Plaintiff cites to *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011) in support of the proposition that a tribal corporation voluntarily waives its sovereign immunity by filing a declaratory judgment action. While that was certainly true in that case, the operative facts there were that the tribal corporation, Amerind, actually conceded that it waived sovereign immunity *as to the declaratory judgment action*, and the matter at issue was sovereign immunity *as to the underlying tort claim*. *Id.* at 684, n.4. Furthermore, that Court went on to find that sovereign immunity was not waived as to the tort claim for reasons that are totally contrary to Plaintiff's other arguments, to wit:

> In fact, Article 8, Section 8.18 of Amerind's charter provides that Amerind may "sue and be sued in the Corporation's name in courts of competent jurisdiction within the United States, *but only to the extent provided in and subject to*

the limitations stated in Article 16 of this Charter." (emphasis added). Article 16.4 provides:

> *Any waiver* [of tribal immunity] by the Corporation . . . *shall be in the form of a resolution duly adopted by the Board of Directors*, which resolution shall not require the approval of the Charter Tribes or the Secretary of the Interior. *The resolution shall* identify the party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the Corporation may be brought. Any waiver shall be limited to claims arising from the acts or omissions of the Corporation, its Directors, officers, employees or agents, and shall be construed only to effect the property and Income of the Corporation.

(emphasis added). The plaintiffs have provided no evidence that Amerind's Board of Directors ever adopted a resolution waiving Amerind's immunity as to the plaintiffs' pending suit, and absent such a resolution, we cannot say that Amerind unequivocally waived its sovereign immunity when it generally assumed ARMC's "obligations and liabilities." *See Memphis Biofuels*, 585 F.3d at 921-22 (where federal charter required board resolution to waive tribal immunity, immunity was not waived without such a resolution even though the corporation's contract with the plaintiff expressly waived all immunities).

Id. at 687-88 (emphasis original) (footnote omitted).

Plaintiff, in arguing that sovereign entities can waive their immunity through their conduct, cites to cases involving states and the Eleventh Amendment, but not Indian tribes. *E.g. Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002) (state's voluntary removal of suit against it to federal court constituted waiver of its Eleventh Amendment immunity as to state law claim). However, Eleventh Amendment sovereign immunity is legally distinguishable from tribal sovereign immunity, *id.* at 623, 122 S.Ct. 1640, and in any event adds little to the inquiry, and the Court gives little weight to these cases.

Among Plaintiff's other "waiver by litigation" arguments is that the Tribe Defendants, by their conduct, actually or effectively filed the bankruptcy petitions on behalf of the Debtors, and thus waived sovereign immunity as to all actions that could be brought under the bankruptcy case, including this adversary proceeding. The Tribe Defendants dispute this, but for purposes of their Motion to Dismiss, the allegation must be taken as true. Plaintiff appears to imply (without citing to any specific supporting authority) that such an allegation, if proven, would be incontrovertible proof that confirms its "waiver by litigation" arguments, even without the use or application of theories of alter ego, piercing the corporate veil, or agency. There appears to be a scarcity of authority on the issue of Indian tribes filing bankruptcy petitions, or causing or directing other entities to do so. First, it is not clear whether or not Indian tribes themselves qualify to be debtors under the Bankruptcy Code, as discussed in Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility Native American Tribes and the Bank-*

ruptcy Code, Am. Bankr. Inst. J., June 2015.[6] Here however, it is the referred-to Debtors, not the Tribe Defendants, who are actually the debtors in these bankruptcy cases. Second, as to whether tribally chartered, tribally owned corporation are eligible to be debtors, the authors state:

> Unfortunately, there are no binding judicial opinions on whether a tribal corporation separate and distinct from the tribe is an eligible debtor. However, if there are facts suggesting that a tribe and a tribally chartered corporation are held out as legally separate entities, and the tribal corporation is the actual obligor on the loan(s), it would seem arguable that tribal casinos might be eligible to file for bankruptcy.

Id. This too is inapplicable here because the Tribe Defendants are an Indian tribe itself and its political subdivision. While the Court notes that a sovereign entity that files a bankruptcy petition for itself thereby subjects itself to ensuing adversary proceedings, *e.g. In re City of Detroit*, No. 13-53846, 2015 WL 603888, at *11 (Bankr. E.D. Mich. Feb. 12, 2015) (listing many adversary proceedings stemming from Chapter 9 petition), that situation is inapplicable to the Tribe Defendants who, as noted, are not subject to a waiver of their sovereign immunity under § 106(a). *In re Greektown Holdings, LLC*, 532 B.R.

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[6] This article concluded that tribes are ineligible to be debtors under Chapters 7, 9, or 11, but it relied on the premise that Indian tribes are "governmental units" as held by *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004) and similar cases. However, the law of the present case is that Indian tribes are not governmental units, at least for purposes of a § 106(a) waiver of sovereign immunity. *In re Greektown Holdings, LLC*, 532 B.R. 680; *accord In re Whitaker*, 474 B.R. 687 (8th Cir. BAP 2012).

680. Plaintiff has cited no legal authorities in support of its proposition that by filing a bankruptcy petition (or causing or directing such filing for another entity), an entity waives its tribal sovereign immunity as to an adversary proceeding subsequently filed against it. The Court finds that these allegations must be denied as being legally unsupported and, furthermore, fail for the additional reasons that follow.

IV. Plaintiff Fails to Meet the High Burden for Waivers of Tribal Sovereign Immunity

Plaintiff essentially proposes the following path to success in this adversary proceeding: *First:* through extensive discovery, Plaintiff wants the opportunity to obtain information to prove that the Tribe Defendants' pre-petition and post-petition conduct as relates to the Debtors amounts to pervasive dominion and control and went well beyond filing proofs of claim or other litigation conduct. Plaintiff argues that it should have the opportunity to conduct this discovery into the extent of the Tribe Defendants' conduct, which in turn would answer the question of the scope of the Tribe Defendants' waiver of sovereign immunity. *Second:* through theories of alter ego, piercing the corporate veil, and/or agency, Plaintiff argues it can convince the Court that the Tribe Defendants should be, as a matter of law, legally equated to the Debtors. *Third:* Plaintiff argues that as a result of the foregoing, the Tribe Defendants thusly voluntarily waived their sovereign immunity by such conduct. As the Court previously noted, for purposes of this Motion to Dismiss, it must assume that Plaintiff's allegations are true. Thus, for present purposes, there is thus no need for discovery, and more importantly, Plaintiff's stated desire for discovery

thus cannot be a defense to the Tribe Defendants' Motion to Dismiss.[7]

Taking all of Plaintiff's allegations as true, the Court finds that such are legally insufficient to amount to a waiver of the Tribe Defendants' sovereign immunity. The burden for finding a waiver of tribal sovereign immunity is a high one. A Congressional waiver of tribal sovereign immunity must be express, unequivocal, unmistakable, unambiguous, clearly evident in statutory language, and allow the Court to conclude with perfect confidence that Congress intended to waive sovereign immunity. *See generally In re Greektown Holdings, LLC*, 532 B.R. 680 (citing various cases and holding that Indian tribes are not within the statutory definition of "other . . . domestic governments"). Statutes are liberally construed in favor of Indians tribes, who have their thumb on the interpretive scale, so to speak. *Id.* at 686. This burden of proof is equally high for *voluntary* waivers of tribal sovereign immunity. For example, the Supreme Court has held:

> To abrogate tribal immunity, Congress must "unequivocally" express that purpose. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citing *United*

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[7] Plaintiff cited to *Sault Ste. Marie Tribe of Chippewa Indians v. Hamilton*, No. 2:09-CV-95, 2010 WL 299483 (W.D. Mich. Jan. 20, 2010) for the proposition that discovery should be permitted into the Tribe's assertion of sovereign immunity before ruling on its motion to dismiss. *Pl. Sur-Reply* (Dkt. 707) at 3. Interestingly, the Court there granted discovery "with regard to the Tribe's governance or its charter documents, which might disclose a basis for waiver." 2010 WL 299483 at *2. Thus, that Court only permitted a *narrow* factual inquiry (and one pertaining to issues that are already undisputed in the case at hand). This cited case does not support Plaintiff's arguments.

> *States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)). Similarly, to relinquish its immunity, a tribe's waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi [Indian] Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). We are satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award.

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (tribe's entry into contract with a specific arbitration and choice of law provisions waived its sovereign immunity as to arbitration and enforcement of arbitration awards)[8]; *White*, 765 F.3d at 1026 (a voluntary waiver by a tribe must be unequivocally expressed); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281 (10th Cir. 2012) (waiver must be clear, not implied, and unequivocally expressed); *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has

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[8] The legal issue of whether or not the subject contract was properly executed was not addressed in *C & L Enterprises*, as stated in 532 U.S. at 423 n.6, 121 S.Ct. 1589:

> The Tribe alternatively urges affirmance on the grounds that the contract is void under 25 U.S.C. § 81 and that the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf. These issues were not aired in the Oklahoma courts and are not within the scope of the questions on which we granted review. We therefore decline to address them.

not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.").

A. Plaintiff's Legal Arguments That Theories of Alter Ego, Piercing the Corporate Veil, and/or Agency Apply Here

Plaintiff and the Tribe Defendants have admittedly been unable to locate any case in which theories of alter ego, piercing the corporate veil, and/or agency have been employed to find a waiver of tribal sovereign immunity. Plaintiff concedes this may be an issue of first impression. Instead, Plaintiff makes arguments involving cases discussing the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.*, which Plaintiff claims are not directly applicable but are instructive for determining the scope of waiver, to wit: *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 1999 WL 307666, 1999 U.S. Dist. LEXIS 7236 (S.D.N.Y. May 13, 1999).[9] Plaintiff would have this Court inquire into (a) the level of control that the Tribe Defendants asserted over the Debtors and (b) whether viewing the Tribe Defendants and the Debtors as distinct would work a fraud or injustice.

Even if Plaintiff somehow manages to prove (despite citing no supporting authority) that the Tribe Defendants can be deemed to have actually or

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[9] Plaintiff also cites to *In re Paques, Inc.*, 277 B.R. 615, 633-37 (Bankr. E.D. Pa. 2000), which does not deal with sovereign immunity or the FSIA, but applies a very limited analysis of the piercing the corporate veil and alter ego theories in order to determine personal jurisdiction over a foreign entity.

effectively filed the bankruptcy petitions on behalf of the Debtors, this argument would also fail to meet the stated burden. First, it is unclear by what vehicle Plaintiff can prove this allegation, given the above-noted doubtful applicability of the theories of alter ego, piercing the corporate veil, and agency. Second, even if this allegation was proven, Plaintiff has not convinced the Court that such would waive the sovereign immunity of the Tribe Defendants, and not just the Debtors (if any Debtors in fact had sovereign immunity). Third, such in any event would still not meet the referred-to high burden for waiver.

The Court finds that the FSIA statute, and thus the cases analyzing it, to be so distinguishable as to have no material bearing on the present situation relating to Indian tribes. The Tribe Defendants correctly argue that the FSIA waives the sovereign immunity of a foreign state if it either explicitly *or by implication* waives that immunity. *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 437 (6th Cir. 2002) (citing 28 U.S.C. § 1605(a)(1)). Additionally, 28 U.S.C. § 1605(a)(2) provides that "a foreign state lacks sovereign immunity in any suit that 'is based upon a commercial activity carried on in the United States by the foreign state[.]'" *Id.* However, 28 U.S.C. § 1603(a) defines "foreign state" to include "an agency or instrumentality of a foreign state as defined in subsection (b)."[10]

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[10] 28 U.S.C. § 1603(b) goes on to provide:

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other

Thus, a plain reading of FSIA provisions indicates that issues of implied waiver, commercial activity, and whether one entity is an agency or instrumentality of another arise out of the statutory language itself, and not out of imputed theories of alter ego, piercing the corporate veil, or agency. In other words, the FSIA contains as a facet an inquiry into such matters. However, as noted, this aspect of the FSIA is antithetical to the present case involving of Indian tribes largely because sovereign immunity waivers cannot be implied, as one Court opined:

> There is simply no room to apply the FSIA by analogy, as Allen would have us do. The FSIA precludes immunity of a foreign state when that state engages in commercial activities in the United States. 28 U.S.C. § 1605(a)(2). To apply that provision to the Tribe would contravene the Supreme Court's decision in *Kiowa*, holding that tribal immunity extended to commercial activities of the tribe. *Kiowa*, 523 U.S. at 760, 118 S.Ct. 1700. FSIA also permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while the Supreme Court permits no such implied waiver in the case of Indian tribes. *See*, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670. We accordingly decline Allen's invitation to apply FSIA by analogy to tribal sovereign immunity.

Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006). Thus, the FSIA is so distinguishable

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ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

that it has no material application to this situation and has no persuasive value aiding Plaintiff's arguments, even if used as an analogy. To the contrary, the FSIA might be seen as an argument in favor of the Tribe Defendants because, although Congress could, it has apparently chosen not to write a similarly broad statute such as FSIA that is applicable to Indian tribes (or at least no such statute has been presented to this Court).

Therefore, by reason of the foregoing, Plaintiff has not presented sufficient legal support for its proposed use of theories of alter ego, piercing the corporate veil, or agency. Because the applicability of these theories is essential to Plaintiff's success, and because the Court thus holds them inapplicable here as a matter of law, such constitutes an independent basis for granting the Tribe Defendants' Motion to Dismiss.

B. Even if Theories of Alter Ego, Piercing the Corporate Veil, and/or Agency Were Applicable, Plaintiff's Application Thereof Would be Legally Insufficient to Meet the High Burden of Waiver of Sovereign Immunity

As stated in the noted various cases, waivers of tribal sovereign immunity must be express, unequivocal, unmistakable, and unambiguous. *See In re Greektown Holdings, LLC*, 532 B.R. 680. Plaintiff's path to success is anything but that, the proposed path being demonstrating "waiver by conduct" by employing theories that are extremely fact-specific. *Steelcase, Inc. v. Harbin's, Inc.*, No. 104CV26, 2005 WL 1923606, at *6 (W.D. Mich. Aug. 11, 2005) (cross motions for summary judgment denied because piercing the corporate veil inquiry under Michigan law is fact-intensive, equitable, and involves credibility

issues and questions of fact); *Needa Parts Mfg., Inc. v. PSNet, Inc.*, 635 F. Supp. 2d 642, 647 (E.D. Mich. 2009) (under Michigan law, question of whether entity was alter ego of another entity is intensely fact-driven, dependent on the equities, and cannot be determined on summary judgment); *Meretta v. Peach*, 195 Mich. App. 695, 697, 491 N.W.2d 278, (1992) ("Where there is a disputed question of agency, any testimony, either direct or inferential, tending to establish agency creates a question of fact for the jury to determine.").

This situation is clearly distinguishable from *C & L Enterprises*, *supra* 532 U.S. 411, 121 S.Ct. 1589, where the Supreme Court found a voluntary waiver by examining and relying upon the language of an explicit contract containing arbitration and choice of law clauses. Instead, Plaintiff here wishes to embark on an expedition of discovery and fact-intensive inquiries. On that point, one Court has stated the following:

> World Touch argues alternatively that the Management Company had apparent authority to bind the Casino and the Tribe to all the terms of the contract, including the waiver of sovereign immunity (or a question of fact exists regarding such authority). World Touch cites authority from the law of agency in support of this argument. However, regardless of any apparent or implicit, or even express, authority of the Management Company to bind the Casino and the Tribe to contract terms and other commercial undertakings, such authority is insufficient to waive the Tribe's sovereign immunity. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (sover-

> eign power "remain[s] intact unless surrendered in unmistakable terms"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed") (internal quotation omitted). Similarly, any argument that subsequent acts, or acquiescence in carrying out the contract entered into with apparent authority, estop the Tribe from claiming sovereign immunity must fail. *See Merrion*, 455 U.S. at 148, 102 S.Ct. 894; *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S.Ct. 1670.

World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271, 276 (N.D.N.Y. 2000) (cited with approval by the Sixth Circuit in *Memphis Biofuels*, 585 F.3d at 922). Further, Plaintiff argues that *Memphis Biofuels* held that "where a contract purports to waive sovereign immunity and the parties fail to obtain that waiver in accordance with the explicit terms of the applicable constitution or charter, the non-sovereign party *will not be able to use equitable or quasi-contractual remedies* to override explicit waiver provisions contained in a tribal constitution or charter." *Pl. Response and Brief in Opp.*, Dkt. 668 at 16 (emphasis altered) (citing 585 F.3d at 922). Plaintiff's planned use of the equitable theories of piercing the corporate veil, alter ego, and/or certain equitable agency principles are thus prohibited even by Plaintiff's own reading of *Memphis Biofuels*.

The practical reality of the situation is that if Plaintiff is given the opportunity to prove its case, such will need to involve lengthy, extensive, and undoubtedly highly-contested discovery. And once discovery is completed, as with any fact-intensive

inquiry, an evidentiary hearing will need to be held involving issues of admissibility, credibility, weight, and the balance of conflicting evidence. To be sure, that is a Court's responsibility and should not be shied away from merely because of its nature or its complexity. But in this inquiry, the Court must be cognizant of the heightened legal burden. But, for the sake of argument and accepting that Plaintiff could persuade the Court of its every allegation, that is still not enough. As a matter of law, Plaintiff cannot but fail to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver. At the very least, any such waiver, even if those allegations are shown by the asserted facts and theories, must by its nature be considered to be "implied" and that would be legally insufficient. *Santa Clara Pueblo*, *supra* 436 U.S. at 58, 98 S.Ct. 1670 (waiver of sovereign immunity cannot be implied but must be unequivocally expressed).

By way of example and as previously noted, the Tribe Defendants previously argued in a separate motion that Congress did not abrogate tribal sovereign immunity by enacting § 106(a). This Court disagreed, finding among other things that the term "other . . . domestic governments" used in § 101(27) clearly and unequivocally includes Indian tribes, and in fact, can and may *only* include Indian tribes. 516 B.R. at 470 (Bankr. E.D. Mich. 2014). The District Court reversed, finding that the applicable statutes did not clearly and unequivocally express Congressional intent to abrogate sovereign immunity. 532 B.R. at 697-701 (E.D. Mich. 2015). The District Court reasoned that, among other things, Congress could have been clearer if it had explicitly referred to "Indian tribes" by name. *Id.* To recapitulate, the

§ 106(a) issue was a matter of *law* that was determined by interpreting *statutes*, but was deemed by the District Court to be insufficient to meet the high burden in the matter before it. In a sense, the heightened clear, unequivocal and non-implied standard and burden to be utilized in sovereign immunity inquiries noted and applied by the District Court, if correct, has similar application and force here. Plaintiff's position encompasses the very definition of "implication,"—a term that essentially involves reading something into a less than explicit situation and inferring and drawing conclusions from derived facts. As such, it perforce falls short of what this Court concludes is the required appropriate standard for finding a waiver.

CONCLUSION

For the foregoing reasons, the Tribe Defendants' Motion to Dismiss must be granted. The Court is entering an appropriate order contemporaneously.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bankruptcy No. 08-53104

Adversary No. 10-05712

No. 14-14103

IN RE: GREEKTOWN HOLDINGS, LLC,
Debtor,

BUCHWALD CAPITAL ADVISORS, LLC,
SOLELY IN ITS CAPACITY AS LITIGATION TRUSTEE
FOR THE GREEKTOWN LITIGATION TRUST,
Plaintiff,
v.

DIMITRIOS ("JIM") PAPAS, ET AL.,
Defendants.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS;
AND KEWADIN CASINOS GAMING AUTHORITY,
Appellants,
v.

BUCHWALD CAPITAL ADVISORS, LLC, LITIGATION
TRUSTEE FOR THE GREEKTOWN LITIGATION TRUST,
Appellees.

[Signed June 9, 2015]

OPINION AND ORDER REVERSING THE BANKRUPTCY COURT'S AUGUST 13, 2014 ORDER DENYING THE TRIBE'S RENEWED MOTION TO DISMISS ON THE GROUNDS OF SOVEREIGN IMMUNITY AND REMANDING FOR FURTHER PROCEEDINGS

PAUL D. BORMAN, District Judge.

This matter is before the Court on Appellants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority's (Appellants or collectively "the Tribe") appeal of United States Bankruptcy Judge Walter J. Shapero's August 13, 2014 Opinion and Order denying Appellants' motion to dismiss based on sovereign immunity. (ECF No. 1, Notice of Appeal; ECF No. 8, Brief of Appellant.) Appellee Buchwald Capital Advisors LLC, Litigation Trustee for the Greektown Litigation Trust (Appellee or "the Litigation Trustee") filed a Response (ECF No. 10) and the Tribe filed a Reply (ECF No. 12). The Court held a hearing on April 1, 2015.

For the reasons that follow, the Court REVERSES the decision of the Bankruptcy Court, finds that Congress did not clearly and unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code, and REMANDS the matter to the Bankruptcy Court for further proceedings on the issue of whether the Tribe waived its sovereign immunity from suit in the underlying bankruptcy proceedings.

INTRODUCTION

In this bankruptcy appeal, the Tribe challenges the Bankruptcy Court's ruling in the underlying Adversary Proceeding that Congress intended to abrogate tribal sovereign immunity from suit in section 106(a)

of the Bankruptcy Code when it abrogated the sovereign immunity of "governmental unit[s]," and further defined a "governmental unit" in section 101(27) of the Bankruptcy Code to include "other . . . domestic government[s]." The Tribe appeals the Bankruptcy Court's Order denying its motion to dismiss based on sovereign immunity, arguing that the failure of the Legislature to clearly and unequivocally manifest an intent to abrogate tribal sovereign immunity when describing the entities whose sovereign immunity was abrogated under the Bankruptcy Code requires dismissal of the claims against it in the Bankruptcy Court Adversary Proceeding. The Litigation Trustee responds that the Legislature need not invoke the magic words "Indian tribes" when intending to remove the cloak of sovereign immunity that otherwise shields Indian tribes from suits against them and argues that the Legislature clearly and equivocally intended just that when it included the catchall phrase "or other . . . domestic government" in section 101(27) of the Bankruptcy Code when defining the term "governmental unit."

I. BACKGROUND

On May 28, 2008, Greektown Holdings, LLC and certain affiliates (collectively the "Debtors"), commenced proceedings under Chapter 11 of the United States Bankruptcy Code, *In re: Greektown Holdings, LLC, et al.*, Debtors (E.D.Mich.Bankr.No. 08-53104). On or about May 28, 2010, this Adversary Proceeding was commenced, *The Official Committee of Unsecured Creditors on Behalf of the Estate of Greektown Holdings, LLC*[1] *v. Dimitrios ("Jim") Papas, Viola Papas,*

[1] By Stipulation dated August 9, 2012 (and approved by Consent Order dated August 14, 2010) the Defendants agreed that Buchwald Capital Advisors LLC ("Buchwald"), in its capacity as

Ted Gatzaros, Maria Gatzaros, Barden Development, Inc., Lac Vieux Desert Band of Lake Superior Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, Kewadin Casinos Gaming Authority, and Barden Nevada Gaming, LLC (E.D.Mich.Bankr.Adv. Pro. No. 10-05712). The Complaint in the Adversary Proceeding alleges that $177 million was fraudulently transferred by the debtor, Greektown Holdings, LLC ("Holdings"), to the Defendants for no or inadequate consideration. (Adv. Pro. ECF No. 1, Complaint.)[2] The Complaint alleges that the fraudulent transfers from Holdings may be avoided and recovered under sections 544 and 550 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, and under the Michigan Uniform Fraudulent Transfers Act ("MUFTA") (Mich. Comp. Laws § 566.31 *et seq.*).

Shortly after the Adversary Proceeding was commenced, on June 25, 2010, the Tribe filed a motion to dismiss the MUFTA claims against it on the grounds of sovereign immunity. (Adv. Pro. ECF No. 8.) The Litigation Trustee opposed the motion (Adv. Pro. ECF No. 56) and the Tribe replied (Adv. Pro. ECF No. 69). Subsequently the parties stipulated to bifurcate the hearing on the motion to dismiss

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the Litigation Trustee of the Greektown Litigation Trust and in its capacity as the Trustee of the Greektown General Unsecured Creditors Distribution Fund Trust, replace the Official Committee of Unsecured Creditors of Greektown Holdings, LLC (the "Committee") as Plaintiff in this Adversary Proceedings. (Bankr. ECF. No. 3359, p. 3 ¶ 8.) When referring to docket entries in the underlying Bankruptcy Proceeding, (E.D. Mich. Bankr. No. 08–53104), the Court will use the reference "Bankr. ECF No. ___."

[2] When referring to docket entries in the MUFTA Adversary Proceeding, (Adv. Pro. No. 10-05712), the Court will use the reference "Adv. Pro. ECF No. ___."

to first decide the purely legal question of whether Congress, in Section 106(a) of the Bankruptcy Code, abrogated the Tribe's sovereign immunity and thereafter, if necessary, to decide whether the Tribe waived its sovereign immunity by participating in the Bankruptcy proceedings. The Bankruptcy Court heard oral argument on December 29, 2010, and took the matter under advisement.

While the issue of sovereign immunity was still under advisement in the Bankruptcy Court, in 2012 the Tribe and the Litigation Trustee reached a settlement, filed a motion to have the settlement approved and requested that the Bankruptcy Court hold off ruling on the Tribe's motion to dismiss pending a decision on the Settlement Motion. This Court approved the Settlement Agreement, which contained a claims bar order that was an important aspect of the Settlement Agreement. (*In re Greektown Holdings, LLC*, Case No. 12-12340, ECF No. 10, Opinion and Order Granting Corrected Motion for Order Approving Settlement Agreement.) The non-settling Defendants in the Adversary Proceeding, Maria Gatzaros, Ted Gatzaros, Dimitrios Papas and Viola Papas ("the Papas and Gatzaros Defendants"), appealed the Court's Order approving the Settlement Agreement, objecting to the inclusion of the claims bar order. (*In re Greektown*, No. 12–12340, ECF No. 33, Notice of Appeal.) The Sixth Circuit reversed and remanded with instructions to this Court to reconsider the propriety and scope of the claims bar order. With the claims bar order under fire, the parties stipulated in this Court to withdraw the motion for an order approving the settlement and the case was dismissed. (*In re Greektown*, No. 12–12340, ECF Nos. 48, 49, Stipulation and Dismissal.) The parties

thereafter agreed to voluntary mediation before Bankruptcy Chief Judge Phillip Shefferly in an effort to resolve all of the claims against the all of the remaining Defendants in the MUFTA Adversary Proceeding. Despite their efforts under Judge Shefferly's guidance, the parties were unable to achieve a settlement of the Adversary Proceeding. (Adv. Pro. ECF No. 449, Mediator's Certificate, 6/2/2014). To date, a global settlement has not been reached.

On June 9, 2015, with settlement negotiations at a standstill, the Tribe renewed its 2010 motion to dismiss on the grounds of sovereign immunity. (Adv. Pro. ECF No. 453, Renewed and Supplemented Motion to Dismiss Adversary Proceeding Re: Sovereign Immunity.) On June 27, 2015, the Litigation Trustee responded and opposed the motion. (Adv. Pro. ECF No. 463.)[3] The Tribe replied (Adv. Pro. ECF No. 469) and the Bankruptcy Court heard oral argument on July 21, 2014.

On August 13, 2014, the Bankruptcy Court issued its Opinion and Order Denying the Tribe's Renewed and Supplemented Motion, concluding that "Congress sufficiently, clearly, and unequivocally intended to abrogate [the Tribe's] sovereign immunity in [section 106 of the Bankruptcy Code]." (August 12, 2014

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[3] The additional remaining Defendants in the MUFTA Adversary Proceedings, Maria Gatzaros, Ted Gatzaros, Dimitrios Papas and Viola Papas ("the Papas and Gatzaros Defendants") also filed a response to the Tribe's motion to dismiss on grounds of sovereign immunity, indicating that they take "no position on whether [legal precedent] entitled the Tribe to dismissal." (Adv. Pro. ECF No. 465, Response at 3.) The Papas and Gatzaros Defendants take the position, however, that "[i]f the Tribe is found to be sovereignly immune and dismissed from this case, Papas' and Gatzaros' rights and defenses will be so seriously impaired that their own dismissal will be required." *Id.* at 6.

Opinion and Order, Adv. Pro. ECF No. 474 at 36.) The Tribe now appeals that ruling to this Court. The question to be answered is purely one of statutory construction: Does Section 106 of the Bankruptcy Code, by reference to section 101(27)'s definition of "governmental unit" to include "other . . . domestic government[s]," clearly and unequivocally express Congress's intent to abrogate the sovereign immunity of Indian tribes? As discussed *infra*, the Court concludes that it cannot say "with perfect confidence" that Congress intended, by using the generic phrase "other domestic governments" in § 101(27), to clearly, unequivocally, unmistakably and without ambiguity abrogate tribal sovereign immunity in § 106(a) of the Bankruptcy Code.

Accordingly, the Court REVERSES the August 13, 2014 Order of the Bankruptcy Court, finds that Congress did not clearly and unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code, and REMANDS this matter to the Bankruptcy Court for further proceedings to address the limited factual issue of whether the Tribe, while enjoying sovereign immunity from suit under the relevant provisions of the Bankruptcy Code, nonetheless waived that immunity in this proceeding.[4]

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[4] In the underlying Adversary Proceeding, the Litigation Trustee responded to the Tribe's motion to dismiss arguing in part that, even assuming the Tribe enjoyed sovereign immunity from suit, the Tribe waived that immunity by "causing the bankruptcy filings" in the underlying proceedings. (Adv. Pro. ECF No. 56, Response and Brief in Opposition to Motion of Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority 2 n.3.) The Bankruptcy Court subsequently, on December 23, 2010, entered a stipulated order bifurcating argument and determination on the Tribe's

II. JURISDICTION AND STANDARD OF REVIEW

The parties do not dispute this Court's jurisdiction to entertain the Tribe's appeal. Under 28 U.S.C. § 158(a)(1), this Court has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by the Bankruptcy Court. The denial of a motion to dismiss on the grounds of sovereign immunity is an immediately appealable "collateral order." *Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan*, 5 F.3d 147, 149-50 (6th Cir.1993). A ruling on a motion to dismiss a bankruptcy court adversary proceeding is reviewed *de novo*. *In re Grenier*, 430 B.R. 446, 449 (E.D. Mich. 2010) (citing *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir.2005)).

A motion to dismiss on the basis of sovereign immunity tests the Court's subject matter jurisdiction to entertain the action. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 919-20 (6th Cir.2009). The Tribe moves under Fed. R. Civ. P. 12(b)(1) to dismiss the Complaint in the

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motion to dismiss. (Adv. Pro. ECF No. 85, Order Upon Stipulation Regarding Bifurcation of Argument on Motions to Dismiss.) The parties agreed to have the bankruptcy court first decide the legal issue of whether Congress abrogated the Tribe's sovereign immunity in section 106 of the Bankruptcy Code and to hold the waiver issue in abeyance pending that ruling. If the bankruptcy court found in favor of the Tribe, the bankruptcy court would schedule a status conference at which the parties would determine a schedule for briefing (and possibly limited discovery) on the issue of waiver. At the hearing on the Tribe's appeal in this Court, the parties acknowledged this agreement and concurred that the issue of waiver should be addressed in the first instance by Judge Shapero. (ECF No. 14, Transcript of April 1, 2015 Bankruptcy Appeal Hearing at 41-42.) Accordingly the Court REMANDS this matter to the Bankruptcy Court for further proceedings related to the issue of waiver.

Adversary Proceeding for lack of subject matter jurisdiction. "In determining whether the Court has subject matter jurisdiction of a claim under Fed. R. Civ. P. 12(b)(1), the Court must assume that plaintiffs' allegations are true and must construe the allegations in a light most favorable to them." *3D Systems, Inc. v. Envisiontec, Inc.*, 575 F. Supp. 2d 799, 802 (E.D. Mich. 2008) (citing *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.*, 203 F. Supp. 2d 853, 855 (W.D. Mich. 2002)). "Relief is appropriate only if, after such construction, it is apparent to the district court that there is an absence of subject matter jurisdiction." *Id.* at 803. "Where jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), a plaintiff bears the burden of proving jurisdiction in order to survive the motion." *Id.* (citing *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir.1986)).

III. ANALYSIS

The parties are in agreement that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Tribal sovereign immunity is a matter of common law, a judicially created doctrine, not deriving from the Eleventh Amendment or an act of Congress. *Id.* at 756, 118 S.Ct. 1700 (noting that the doctrine of tribal immunity developed "almost by accident" and is said to rest in the Supreme Court's decision in *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919)). "*Turner*'s passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit." *Id.* at 757, 118 S.Ct. 1700

(citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (*USF & G*) (holding that "Indian Nations are exempt from suit without Congressional authorization").

"To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) ("*Potawatomi*") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). As Judge Shapero noted in his Opinion and Order, the Tribe throughout retains "a thumb on the interpretive scale tending to tip the balance in their favor in the event of an ambiguity or lack of clarity." (8/12/2014 Opinion and Order 36.) *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Federal Aviation Administration v. Cooper*, —— U.S. ——, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012) ("Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. Any ambiguities in the statutory language are to be construed in favor of immunity, so that the [Tribe's] consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize" suit against the Tribe.) (internal quotation marks and citations omitted) (alteration added).[5]

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[5] Tribal immunity derives from the common law, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (observing that "Indian tribes have long been recognized as possessing the common-law immunity from suit tradi-

Finally, although immune from suit absent express abrogation by Congress, Indian tribes remain bound to comply notwithstanding the fact that the laws cannot be enforced against them:

> To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In [*Oklahoma Tax Com'n v. Citizen Band*] *Potawatomi* [*Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)] for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S.Ct., at 909-910. There is a difference between the right to demand compliance with state laws and the means available to enforce them. *See id*., at 514, 111 S.Ct., at 911-912.

Kiowa, 523 U.S. at 755, 118 S.Ct. 1700.

Whether Congress has unequivocally expressed the intent, in section 106 of the Bankruptcy Code, to

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tionally enjoyed by sovereign powers"), and the Supreme Court has relied upon Eleventh Amendment immunity cases in defining the requirements of waiver of tribal immunity. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor*, 187 F.3d 1174, 1181 (10th Cir.1999) (noting that courts have used similar language in defining the requirements of waiver of these immunities) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (noting that Congress must "unequivocally express its intent to abrogate the immunity") (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), an Eleventh Amendment immunity case)). *See also Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir.2004) (when analyzing whether tribal sovereign immunity is abrogated, courts "may look to state sovereign immunity precedent to help determine how 'explicit' an abrogation must be").

abrogate tribal sovereign immunity is the question presented in this bankruptcy appeal. The issue has been analyzed by a handful of courts, leading to two irreconcilable conclusions. *Compare*, *e.g.*, *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, *Navajo Nation v. Krystal Energy Co., Inc.*, 543 U.S. 871, 125 S.Ct. 99, 160 L.Ed.2d 118 (2004) (finding that sections 106(a) and 101(27) of the Bankruptcy Code expressly and unequivocally waive the sovereign immunity of an Indian tribe) *with In re Whittaker*, 474 B.R. 687 (8th Cir. BAP 2003) (finding that Congress did not unequivocally express its intent to abrogate tribal sovereign immunity in actions under the Bankruptcy Code).

A. The Statutory Text and the Interpretive Issue

11 U.S.C. § 106(a) provides as follows:

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such

sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(6) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate. 11 U.S.C. § 106 (1995).

The claims in this MUFTA Adversary Proceeding are brought under Sections 544 and 550 of the Bank-

ruptcy Code and thus would be claims as to which the sovereign immunity of "governmental units" has been abrogated. 11 U.S.C. § 101(27) in turn defines "governmental unit" as follows:

> (27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

It is not disputed that these statutory sections do not specifically mention "Indian tribes," nor does any other provision of the Bankruptcy Code expressly mention "Indian tribes." *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000) (concluding that Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code and noting that the "Code makes no specific mention of Indian tribes"). The issue is whether the Tribe can be considered a "governmental unit" whose sovereign immunity is abrogated under section 106(a) because Congress defined "governmental unit" to include, in addition to those sovereign entities specifically listed, "other domestic government[s]."

To summarize the opposing arguments, the Litigation Trustee asserts that the Tribe is undeniably both "domestic," i.e. not foreign, and a "government," i.e. possessing sovereign status. The Litigation Trustee notes that the Supreme Court has historically used both terms (although admittedly never together apart from a very recent reference discussed *infra*) when referring to Indian tribes, describing them, for

example, as "tribal governments" and "domestic dependent nations." The Tribe argues that the Supreme Court has never referred to Indian tribes with the phrase "domestic governments" and insists that in order to abrogate tribal immunity, Congress must invoke the phrase Indian tribes, tribal governments, or some verbiage that uniquely and historically has been used to describe the Indian tribes. The Tribe submits that the phrase "domestic government" is not sufficiently unequivocal, without specific reference to Indian tribes, to state an intent to include Indian tribes among the entities whose sovereign immunity has been waived in section 106(a) of the Bankruptcy Code.

B. The Common Law Doctrine of Tribal Sovereign Immunity

The Supreme Court recently addressed the issue of tribal sovereign immunity in *Michigan v. Bay Mills Indian Community*, —— U.S. ——, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). In *Bay Mills*, the Supreme Court held that tribal sovereign immunity protected Bay Mills from suit against it for opening a casino outside Indian lands. At issue was the interpretation of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, which creates the framework for regulating gaming activity on Indian lands. 134 S.Ct. at 2028. The opinion is important for our purposes not for its ultimate interpretation of the IGRA but rather for its restatement of the historical underpinnings of the doctrine of tribal sovereign immunity and its refusal to revisit and reverse course on prior decisions holding that tribal immunity cannot be abrogated absent an express Congressional statement or waiver.

By way of background, the Court in *Bay Mills* provided the following historical synopsis of the Court's own rulings on the judicially created, common law doctrine of tribal sovereign immunity:

> Indian tribes are "'domestic dependent nation'" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (*Potawatomi*) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. *See United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive'" to "legislate in respect to Indian tribes"). And yet they remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).
>
> Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S., at 58, 98 S.Ct. 1670. That immunity, we have explained, is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); *cf.* The Federalist No. 81, p. 511 (B.

> Wright ed. 1961) (A. Hamilton) (It is "inherent in the nature of sovereignty not to be amenable" to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. *See United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (*USF & G*) ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit"). Thus, we have time and again treated the "doctrine of tribal immunity [as] settled law" and dismissed any suit against a tribe absent congressional authorization (or a waiver). *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

134 S.Ct. at 2030-31.

Applying these precedents, Justice Kagan, writing for the majority and joined by Justices Roberts, Kennedy, Breyer and Sotomayor, relied on the doctrine of *stare decisis* and concluded that tribal sovereign immunity remained a strong shield for Indian tribes and deferred to Congress to alter the course set by these precedents if it so chose. The dissent urged that it was time for the Court to reverse course, admit that previous cases were wrongly decided "[r]ather than insist that Congress clean up a mess" that the Court created and significantly scale back the broad doctrine of tribal sovereign immunity. *Id.* at 2045 (Scalia, J. dissenting). Justice Thomas, writing the principal dissent and joined by Justices Scalia, Ginsburg and Alito, criticized the majority for failing to appreciate the changing economic reality in which

"the commercial activities of tribes have increased dramatically . . . [with] tribes engage[d] in domestic and international business ventures including manufacturing, retail, banking, construction, energy, telecommunications, and more," *id.* at 2050 (internal quotation marks and citation omitted) (alterations added), yet remaining "largely litigation-proof" in the majority of these commercial enterprises. *Id.* at 2051. "As long as tribal immunity remains out of sync with this reality," Justice Thomas wrote, "it will continue to invite problems." *Id.* at 2052.

Although the majority in *Bay Mills* appeared to appreciate that a change in the doctrine of tribal sovereign immunity may be called for, it held fast to precedent, and in particular to the Court's decision in *Kiowa*, *supra*, which fully embraced the doctrine in its broadest sense. The majority observed that the Court in *Kiowa* "comprehended the trajectory of the tribes' commercial activity (which is the dissent's exclusive rationale for ignoring *stare decisis* . . .)," and concluded that "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Id.* at 2037.

C. Did Congress Intend to Abrogate Tribal Sovereign Immunity in Section 106(a) of the Bankruptcy Code?

It is against the backdrop of this recent Supreme Court decision, reaffirming the sanctity of the "special brand of sovereignty" that Indian tribes have historically enjoyed, that we analyze whether, in section 106 of the Bankruptcy Code, Congress unequivocally, unmistakably and without ambiguity, by invoking the phrase "or other domestic governments," intended to abrogate the "special brand of sovereignty" that Indian tribes enjoy.

1. The Ninth Circuit's decision in *Krystal Energy* and similar authority finding an unequivocal Congressional expression of abrogation in section 106 of the Bankruptcy Code.

Arguing that section 106 of the Bankruptcy Code unequivocally abrogates tribal sovereign immunity, the Litigation Trustee relies on the Ninth Circuit's decision in *Krystal Energy*, which explicitly so holds. In *Krystal Energy*, the Ninth Circuit found that the definition of "governmental unit" in § 101(27) broadly captured *all* foreign and domestic governments:

> It is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of all "foreign and domestic governments." Section 106(a) explicitly abrogates the sovereign immunity of all "governmental units." The definition of "governmental unit" first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, "or other foreign or domestic governments." 11 U.S.C. § 101(27). Thus, all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered "governmental units" for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.

357 F.3d at 1058. The court observed that "Indian tribes are certainly governments," and further found that "[t]he Supreme Court has recognized that Indian tribes are 'domestic dependent nations,' and concluded that therefore 'the category "Indian tribes" is simply a specific member of the group of the domestic governments, the immunity of which Congress intended to abrogate.'" *Id.* at 1057-58. Having reached the conclusion that Indian tribes are

"domestic governments," the Ninth Circuit concluded that therefore Congressional intent to abrogate their sovereign immunity was clearly expressed in section 106, citing several bankruptcy court decisions so holding:

> Had Congress simply stated, "sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity," there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of any "foreign or domestic government." Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes. *See In re Russell*, 293 B.R. 34, 44 ([Bankr.] D. Ariz. 2003) (concluding that § 106(a) abrogates tribal sovereign immunity "unequivocally[] and without implication"); *see also In re Davis Chevrolet, Inc.*, 282 B.R. 674, 683 n.5 (Bankr. D. Ariz. 2002) ("It seems to this court that 'other domestic government' is broad enough to encompass Indian tribes."); *In re Mayes*, 294 B.R. 145, 157-60 (10th Cir. [BAP] 2003) (McFeeley, J., dissenting) (arguing that § 106(a) does abrogate tribal sovereign immunity); *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995) (holding that Tribe had individually waived its sovereign immunity, and stating in dicta that § 106(a) did abrogate the sovereign immunity of Indian tribes under the Bankruptcy Code).

357 F.3d at 1058 (alteration in original).

The *Krystal* court noted that this "syllogistic reasoning" had been followed by the Supreme Court in the context of Congressional abrogation of state sovereign immunity in *Kimel v. Florida Bd. of*

Regents, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), where the Supreme Court held that Congress had clearly expressed its intent to abrogate the sovereign immunity of the states when passing certain amendments to the Age Discrimination Enforcement Act (ADEA) that permitted suits against "any employer (including a public agency)" to be brought in any Federal or State court. *Kimel*, 528 U.S. at 73, 120 S.Ct. 631. Although "states" were not expressly listed in the provision authorizing such suits, the Supreme Court in *Kimel* looked to a different section of the ADEA which expressly defined "public agency" to include "the government of a State or political subdivision thereof," to conclude that "[r]ead as whole the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Kimel*, 528 U.S. at 74, 120 S.Ct. 631. In relying on *Kimel*, the Ninth Circuit found it "evident but, in the end, unimportant," that unlike the definition of "public agency" in the ADEA that specifically lists "States," no definition in the Bankruptcy Code mentions "Indian tribes." *Krystal Energy*, 357 F.3d at 1058-59.

The Ninth Circuit found sufficient support for its conclusion in the fact that "in enacting the Bankruptcy code, Congress was legislating against the back-drop of prior Supreme Court decisions, which *do* define Indian tribes as domestic nations, i.e. governments, as well as against the ordinary, all-encompassing meaning of the term 'other foreign or domestic governments.'" *Id.* at 1059. Just as Congress need not "expressly mention Alabama and Wyoming" when abrogating the Eleventh Amendment immunity of "all states," the Ninth Circuit reasoned, it need not mention "Indian tribes" when

abrogating the sovereign immunity of all "domestic governments." *Id.* Finding Indian tribes to be members of the "generic class" of "domestic governments" did not, the Ninth Circuit concluded, run afoul of the Supreme Court's "admonitions to 'tread lightly' in the area of abrogation of tribal sovereign immunity." *Id.* at 1060. "[T]he Supreme Court's decisions do not require Congress to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity." *Id.* at 1061. According to *Krystal*, no prohibited implication is necessary to conclude that in section 106(a) Congress unmistakably intended to abrogate tribal sovereign immunity:

> Section 106(a) does not simply "authorize suit in federal court" under the Bankruptcy Code—it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. So to recognize is not, as the Navajo Nation suggests, to imply an abrogation that is not explicit in the statute. Instead, reading § 106(a)'s express abrogation as reaching Indian tribes simply interprets the statute's reach in accord with both the common meaning of its language and the use of similar language by the Supreme Court. No implication beyond the words of the statute is necessary to conclude that Congress "unequivocally expressed" its intent to abrogate Indian tribes' immunity.

357 F.3d at 1060. *See also In re Russell*, 293 B.R. 34, 39 (Bankr. D. Ariz. 2003) (finding a distinction between inference (prohibited) and deduction (permitted) and concluding that deduction from what is expressly said in sections 101(27) and 106(a) yielded the conclusion that Congress expressly intended to abrogate tribal sovereign immunity and thus finding

"no violation of the Court's proscription against abrogation by implication in concluding that § 106 includes Indian tribes"). More recently, in *In re Platinum Oil Props., LLC*, 465 B.R. 621, 643 (Bankr. D. New Mexico 2011) the bankruptcy court relied on the *Krystal Energy* and *In re Russell* line of authority, to similarly conclude that "[t]he language 'or other foreign or domestic government' found in 11 U.S.C. § 101(27) includes Indian tribes, such that 11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress' clear and unequivocal abrogation of tribal sovereign immunity." The court in *Platinum Oil* recognized that this was not "the universal view," but apparently found it to be the better reasoned one. *Id.* at 644 n.19.

In addition to this line of authority, the Litigation Trustee urges the Court to consider also that Justice Sotomayor, in her concurring opinion in *Bay Mills*, used the very phrase at issue here, i.e. "domestic governments," when comparing the sovereign status of States and Indian tribes. Justice Sotomayor observed that it would not foster comity among sovereigns to permit States to sue Indian tribes for commercial activity on State lands while at the same time precluding tribes from suing States for commercial activity on Indian lands. Following this observation, she noted that "[b]oth States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government." 134 S.Ct. at 2042 (Sotomayor, J. Concurring). While interesting to note that Justice Sotomayor used the very phrase at issue here, to wit "domestic governments," to characterize both States and Indian tribes, Justice Sotomayor was neither called upon to, nor did she imply that she was attempting to, create a generic description that could be used as a substitute for the phrase "Indian tribes"

in the context of a Congressional abrogation of tribal sovereign immunity. Apart from this one instance in this concurring opinion, uttered years after section 106(a) of the Bankruptcy Code was adopted by Congress, it is undisputed that Indian tribes have never been referred to by the Supreme Court as "domestic governments." The bankruptcy court placed little weight on this statement in Justice Sotomayor's concurring opinion in *Bay Mills* and so does this Court.

There cannot be reasonable debate that Indian tribes are both "domestic" (in fact the Tribe concedes this attribute) and also that Indian tribes are fairly characterized as possessing attributes of a "government." *See Bay Mills*, 134 S.Ct. at 2030 (observing that immunity is a "necessary corollary to Indian sovereignty and *self-governance*" and that a tribe's immunity, "like its other *governmental powers*" are in Congress's hands); *Id.* at 2032 (noting that courts will not "lightly assume that Congress intends to undermine Indian *self-government*"); *Turner v. United States*, 248 U.S. 354, 357-58, 39 S.Ct. 109, 63 L.Ed. 291 (1919) ("Like other *governments*, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace."); *Parks v. Ross*, 52 U.S. 362, 374, 11 How. 362, 13 L.Ed. 730 (1850) ("The Cherokees are in many respects a foreign and independent nation. They are *governed* by their own laws and officers, chosen by themselves.") (all emphasis added).

For the Litigation Trustee, it is enough to have established that Indian tribes are both "domestic" and "governments" to reach the inevitable and unassailable conclusion that Congress expressly and unequivocally meant to include Indian tribes when

it employed the phrase "domestic governments" in § 101(27). *Krystal Energy*, *In re Platinum Oil*, and *In re Russell* expressly so hold and Judge McFeeley's dissent in *In re Mayes* concurs in this result. These courts agree with the Litigation Trustee that Congress need not invoke the "magic words Indian tribes" when intending to abrogate tribal sovereign immunity. *But*, these decisions do not recognize that there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute. Nor do these decisions place any significance on the fact that in many instances, when Congress did mean to abrogate tribal immunity, it did use the "magic words" "Indian tribes" in doing so. As discussed *infra*, *Krystal* and *In re Russell* do not give sufficient consideration to the "special brand" of sovereign immunity that Indian tribes enjoy. *Bay Mills*, 134 S.Ct. at 2037.

2. The Eight Circuit Bankruptcy Appellate Panel's decision in *In re Whittaker* and similar authority finding that Congress did not clearly and unequivocally abrogate the sovereign immunity of Indian tribes in § 106 of the Bankruptcy Code.[6]

In *In re Whittaker*, 474 B.R. 687 (8th Cir. BAP 2012), the Eighth Circuit Bankruptcy Appellate Panel

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[6] This Court recognizes that a Bankruptcy Appellate Panel (BAP) holding is not on par with a Circuit Court of Appeals holding. A BAP is a three judge panel consisting of three bankruptcy judges that hears appeals from a single bankruptcy judge. An appeal can be taken from the BAP decision to that Judicial Circuit's Court of Appeals. A BAP ruling is not binding precedent in that Circuit. Nevertheless, this Court finds persuasive the reasoning and conclusion of the Eighth Circuit BAP in *Whittaker*.

expressly rejected the Ninth Circuit's reasoning in *Krystal*, and held that absent a specific mention of "Indian tribes" in the Bankruptcy code, any finding of abrogation under § 106(a) necessarily must rely on inference or implication, both of which are prohibited by Supreme Court precedent. Quoting from *In re National Cattle Congress*, *supra*, the panel noted cases in which specific statutory reference to Indian tribes had been found sufficiently unequivocal to abrogate tribal sovereign immunity:

> Courts have found abrogation of tribal sovereign immunity in cases where Congress has included "Indian tribes" in definitions of parties who may be sued under specific statutes. *See Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding congressional intent to abrogate Tribe's sovereign immunity with respect to violations of the Resource Conservation and Recovery Act, [which expressly included "an Indian tribe or authorized tribal organization" in the definition of "municipalities" covered by the Act]); *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (same re Safe Drinking Water Act [which also included "Indian tribes" in the definition of "municipalities" covered by the Act]). "Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the Santa Clara requirement than that Congress unequivocally state its intent." *Osage Tribal Council*, 187 F.3d at 1182.
>
> Where the language of a federal statute does not include "Indian tribes" in definitions of parties subject to suit or does not specifically assert

> jurisdiction over "Indian tribes", courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-58 (2d Cir. 2000) (holding Indian tribe immune from suit under the Copyright Act); *Florida Paraplegic* [*Ass'n. Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999)] (stating that because Congress made no specific reference to Tribes anywhere in the ADA, tribal immunity is not abrogated; suit under ADA dismissed). A Congressional abrogation of tribal immunity cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670.

474 B.R. at 691 (quoting *In re Nat'l Cattle Congress*, 247 B.R. at 267) (alterations added). Finding *Krystal* unpersuasive given its failure to cite one case where tribal immunity was found to have been abrogated in the absence of a specific mention of the words "Indian tribes," and deriding the Ninth Circuit's failure to adhere to the clear proscription against inference and implication in finding such abrogation, the panel refused to follow *Krystal*:

> In sum, the cases relied on by *Krystal* and the trustees here do not support the proposition that Congress can express its intent to abrogate sovereign immunity as to Indian tribes without specifically saying so. Instead, courts have been directed to adhere to the general principle that statutes are to be interpreted to the benefit of Indian tribes. . . . We hold that in enacting § 106, Congress did not unequivocally express its intent by enacting legislation explicitly abrogating the sovereign immunity of tribes. As the Court in

> *In re National Cattle Congress* held, holding otherwise requires an inference which is inappropriate in this analysis. The Tribes are, therefore, protected from suit here by their sovereign immunity.

474 B.R. at 695 (footnotes omitted).

The Tenth Circuit Bankruptcy Appellate Panel suggested the same conclusion in *In re Mayes*, 294 B.R. 145 (10th Cir. [BAP] 2003). Although not a basis for the holding in *In re Mayes*, the panel noted that § 106(a) "probably" could not be interpreted as an unequivocal expression of Congressional intent to abrogate tribal sovereign immunity:

> Section 101(27) does not refer to Indian nations or tribes. The only portion of that section that could be said to apply to an Indian nation or tribe is its reference to a "domestic government." While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are "domestic governments" to which §§ 101(27) and 106 apply, *see Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.)*, 282 B.R. 674, 678 n.2 (Bankr. D. Ariz. 2002); *Turning Stone Casino v. Vianese (In re Vianese)*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995); *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981), we conclude that they probably are not. Accordingly, § 106(a) likely could not abrogate Appellee's immunity even if it were constitutional. *See In re National Cattle Congress*, 247 B.R. 259, 266-67 (Bankr. N.D. Iowa 2000). Our conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied.

> *See*, *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

294 B.R. at 148 n.10.

The Tribe also convincingly relies on Supreme Court precedent analyzing issues of state sovereign immunity suggesting that inference from generic descriptions of a group of entities is impermissible to support a finding of abrogation. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), the Court found that a provision in the Rehabilitation Act of 1973 that permitted suit to be filed against "any recipient of federal assistance," was insufficient to express clearly and unequivocally Congress's intent to abrogate the sovereign immunity of the states:

> The statute thus provides remedies for violations of § 504 by "any recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

473 U.S. at 245-46, 105 S.Ct. 3142 (citations omitted).[7]

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[7] Congress in fact responded to *Atascadero* by passing clarifying legislation. *See* 42 U.S.C. § 2000d-7(a)(1), which explicitly states that "[a] state shall not be immune . . . from suit in Federal

Similarly, in *Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989), reiterating its reasoning in *Atascadero*, the Supreme Court found insufficient Congressional intent to abrogate states' immunity in the Education of Children With Handicaps Act ("EHA"). First, the Court completely rejected efforts to rely on *any* nontextual source as support for a finding of such intent:

> More importantly, however, respondent's contentions [regarding Congress's amendments to the Rehab Act in response to *Atascadero* clarifying an intent to abrogate state immunity as evidence of such intent in the EHA] are beside the point. Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is "unmistakably clear in the language of the statute." *Atascadero*, 473 U.S., at 242, 105 S.Ct., at 3147. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual. Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which, "[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest." [*Muth v. Central Bucks School Dist.*] 839 F.2d [113], at 128 [(3d Cir.1988)]. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the

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court for a violation of Section 504 of the Rehabilitation Act of 1973."

> Eleventh Amendment. If Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met.

491 U.S. at 230, 109 S.Ct. 2397 (alteration added).

Turning to the textual arguments in support of abrogation, the Court noted first that "the EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." 491 U.S. at 231, 109 S.Ct. 2397.[8] The Court then rejected the suggested inference that because the EHA refers often to "states" and to their important role in effectuating the purposes of the EHA, Congress must have intended to subject them to suit:

> We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary

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[8] As discussed *infra*, and as urged by the Litigation Trustee, this is a point of distinction between *Dellmuth* and this case, in which the subject of abrogation of sovereign immunity is expressly addressed in section 106(a) of the Bankruptcy code.

> before we will determine that Congress intended to exercise its powers of abrogation.

491 U.S. at 232, 109 S.Ct. 2397. Thus, *Dellmuth* forbids consideration of nontextual evidence and rejects logical inference as a method of divining Congressional intent to abrogate sovereign immunity, at least in the absence of other concrete textual support permitting one to draw "with perfect confidence" the conclusion that abrogation was intended. *Id.* at 231, 109 S.Ct. 2397.

3. Bankruptcy Judge Shapero's opinion.

Judge Shapero largely adopts the reasoning of the Ninth Circuit in *Krystal Energy* and embraces the "deductive reasoning" rationale of *In re Russell*. Judge Shapero was persuaded by the distinction he perceived between interpreting a statute that is silent on the topic of abrogation of sovereign immunity and interpreting a statute that mentions the subject but imperfectly defines its scope. The former instance, in Judge Shapero's opinion, requires implication (prohibited) but the latter requires only deduction (permitted):

> In the Court's opinion, there is a material difference between (a) determining the scope or extent of an explicitly stated abrogation of sovereign immunity, as is the issue here; and (b) determining whether there was any abrogation in the first place where the statute is silent on the matter.
>
> In the Court's opinion, the most important lesson from *In re Russell* is that implication is distinguishable from deduction. Black's Law Dictionary (9th ed. 2009) defines deduction as "[t]he act or process of reasoning from general propositions to a specific application or conclusion." For example, the Bankruptcy Code does not specifically

> list "Arizona" in its definition of governmental units whose sovereign immunity is abrogated. But that conclusion can be deduced by a simple syllogism: sovereign immunity is abrogated as to states; Arizona is a state; therefore sovereign immunity is abrogated as to Arizona. *In re Russell*, 293 B.R. at 41. Similarly, it can be said that sovereign immunity is abrogated as to "other . . . domestic governments," Indian tribes are "other . . . domestic governments" (and indeed they are the only "other . . . domestic governments"), therefore sovereign immunity is abrogated as to Indian tribes.

In re Greektown Holdings, LLC, 516 B.R. 462, 474-75 (Bankr. E.D. Mich. 2014) (initial citations and footnote omitted). According to Judge Shapero, because in this case the statute undeniably directly addresses abrogation of sovereign immunity in § 106(a), and the Tribe only objects that it does not do so clearly enough as to the special sovereign immunity possessed by Indian tribes, Judge Shapero concludes that this is a case of "deductive" reasoning, to be distinguished from those cases where the statute does not touch upon the issue of sovereign immunity *at all*, which then require the prohibited "implication and inference." And because Judge Shapero also concludes that "domestic government" clearly encompasses "Indian tribes," he "deduces" that therefore § 106(a) unequivocally expresses an intent to abrogate tribal immunity.

The faulty premise in this reasoning is that it presumes the very issue in contention, i.e. that "domestic government" is a phrase clearly understood beyond all rational debate to encompass an Indian tribe, just as the word "state" is clearly understood

beyond all rational debate to encompass Arizona and the other 49 "states." But the two "deductions" are quite obviously qualitatively different. While this Court accepts the conclusions that Indian tribes are both "domestic" and bear the hallmarks of "governments," it does not necessarily follow that combining these admitted attributes together in a single generic phrase in § 101(27) "unequivocally and unmistakably," and "without ambiguity" leads one to conclude with "perfect confidence" that Congress intended thereby to include Indian tribes and to abrogate the "special brand" of sovereign immunity enjoyed by Indian tribes without so much as a reference to Indian tribes in the Bankruptcy Code.

4. This Court cannot conclude with "perfect confidence" that Congress intended to abrogate tribal sovereign immunity by invoking the catchall phrase "other domestic governments" in section 101(27) of the Bankruptcy Code.

While perhaps it may be said with "perfect confidence" that Indian tribes are both "domestic" in character and function as a "government," this Court cannot say with "perfect confidence" that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally and unmistakably express its intent to include Indian tribes among those sovereign entities specifically mentioned whose immunity was thereby abrogated. While logical inference may support such a conclusion, Supreme Court precedent teaches that logical inference is insufficient to divine Congressional intent to abrogate tribal sovereign immunity. And if indeed the only sovereign entity not specifically listed in section 101(27) is Indian tribes, and if Congress clearly intended that they be

included, why not just mention them by their specific name, as Congress has always done in the past?

The argument in favor of abrogation relies heavily on the fact that § 106(a) contains a broad, sweeping abrogation of the immunity of every type of sovereign entity and reasons from this that excluding Indian tribes from that list would be anomalous, or "sophistry" to quote the Litigation Trustee. But this is not necessarily so. The Supreme Court early, and recently, has expressed the view that the immunity possessed by the Indian tribes is different in kind from that possessed by foreign entities and different in kind from that possessed by the states. Early, the Supreme Court held:

> But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'
>
> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent

> article, unless there be something in its language to authorize the assumption.

Cherokee Nation v. State of Georgia, 30 U.S. 1, 18, 5 Pet. 1, 8 L.Ed. 25 (1831).

Recently, in *Bay Mills*, Justice Sotomayor in her concurrence draws on this description of the Indian tribes in *Cherokee Nation* in characterizing the tribes today:

> The case of *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831), is instructive. In 1828 and 1829, the Georgia Legislature enacted a series of laws that purported to nullify acts of the Cherokee government and seize Cherokee land, among other things. *Id.*, at 7-8. The Cherokee Nation sued Georgia in this Court, alleging that Georgia's laws violated federal law and treaties. *Id.*, at 7. As the constitutional basis for jurisdiction, the Tribe relied on Article III, § 2, cl. 1, which extends the federal judicial power to cases "between a state, or the citizens thereof, and foreign states, citizens, or subjects." 5 Pet., at 15 (internal quotation marks omitted). But this Court concluded that it lacked jurisdiction because Tribes were not "foreign state[s]." *Id.*, at 20. The Court reasoned that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Id.*, at 16. Tribes were more akin to "domestic dependent nations," the Court explained, than to foreign nations. *Id.*, at 17. We have repeatedly relied on that characterization in subsequent cases. *See, e.g.*, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Merrion*

v. Jicarilla Apache Tribe, 455 U.S. 130, 141, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

134 S.Ct. at 2040-41 (Sotomayor, J. Concurring) (alterations in original).

Given the historical treatment of Indian tribes as special and distinct from either states or foreign governments, one cannot presume that Congress intended to include them, without mentioning them but solely by force of deduction, as among a group of sovereign entities with whom they share very little other than their sovereign status. There is not a single example of a Supreme Court decision finding that Congress intended to abrogate the sovereign immunity of the Indian tribes without specifically using the words "Indians" or "Indian tribes." When asked at the hearing on this matter to provide the Court with an example of a case where the Supreme Court found an abrogation of tribal immunity where the words "Indians" or "Indian tribes" were not used, counsel for the Litigation Trustee referenced *F.A.A. v. Cooper*, ——U.S. ——, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012), which did not touch on the issue of tribal sovereign immunity at all. The Court in *Cooper* explained that although congressional intent to waive the Government's immunity must be unmistakably clear, "Congress need not state its intent in any particular way," and the Court has "never required Congress to use magic words." *Id.* at 1448. *Cooper* stands for the general proposition that Congress need not use any particular "magic words" if the intent to abrogate immunity is clearly discernible from the statutory text. *Cooper* is not a case dealing with Indian tribes or tribal sovereign immunity and thus was unresponsive to the Court's inquiry. Counsel for the Litigation Trustee also directed the

Court's attention on this point to *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), a case in which the Supreme Court concluded that the phrase "in Alaska," as used in a statute providing for protection of Alaska's natural resources, was unambiguous and therefore rejected the Ninth Circuit's reliance on the maxim of statutory construction that "doubtful expressions must be resolved in favor of Indians." 480 U.S. at 55, 107 S.Ct. 989. *Gambell* had nothing to do with tribal sovereign immunity at all and certainly was not a case where the Supreme Court found a waiver of tribal immunity in a statute that did not mention the words "Indian" or "Indian tribes."

By contrast, there are many examples where lower courts have found such abrogation where Indian tribes are mentioned by name. *See Osage Tribal Council v. United States Dept. of Labor*, 187 F.3d 1174, 1182 (10th Cir.1999) (concluding that Congress intended the Safe Drinking Water Act to abrogate tribal sovereign immunity where jurisdiction was granted over "persons" and "persons" was defined to include "municipalities" which in turn was defined to include "Indian tribes"); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) (concluding that Indian tribe was subject to garnishment under the FDCPA where "garnishee" defined to include "person" and person defined to include an Indian tribe); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (concluding that Congress intended the Resource Conservation and Recovery Act to abrogate tribal immunity where "person" is defined to include a municipality and municipality is defined to include an Indian tribe).

In contrast to these cases, we have examples of lower courts refusing to find abrogation of tribal immunity where Indian tribes are *not* referenced by name. *Florida Paraplegic*, 166 F.3d 1126, 1132-33 (11th Cir. 1999), is particularly instructive. In *Florida Paraplegic*, the Eleventh Circuit concluded that Congress did not clearly express an intent in the Americans With Disabilities Act ("ADA") to abrogate tribal sovereign immunity, although it explicitly provided that "states" were not immune from suit under the ADA, because it failed to specifically mention Indian tribes. The Eleventh Circuit first noted that abrogation of tribal immunity must be "unequivocally expressed," heeding "the Supreme Court's repeated instruction that, because of the 'unique trust relationship between the United States and the Indians,' where Indian rights are at issue, ambiguities in federal laws must be resolved in the Indians' advantage." *Id.* at 1131 (quoting *Blackfeet*, *supra*). The court then concluded that the absence of any reference to "Indians" or "Indian tribes" anywhere in the ADA precluded a finding that Congress intended to abrogate their immunity from suit:

> An examination of Title III of the ADA reveals that it does not meet the strict requirements of this test. Despite its apparent broad applicability, *see supra* Part III.A, no specific reference to Indians or Indian tribes exists anywhere in Title III.

166 F.3d at 1131. Finding no mention of Indian tribes in the provision of the ADA expressly providing that States were not immune from suit under the Eleventh Amendment, the Eleventh Circuit ruled that no such abrogation could be implied:

> Congress has demonstrated in this very statute its ability to craft laws satisfying the Supreme Court's mandate that courts may find that Congress has abrogated sovereigns' immunity from lawsuits only where it has expressed unequivocally its intent to do so. That it chose not to similarly include an abolition of the immunity of Indian tribes is a telling indication that Congress did not intend to subject tribes to suit under the ADA.

166 F.3d at 1133.

Importantly, as discussed *supra*, the Supreme Court has refused to permit an inference of abrogation in the context of state immunity from suit where such intent must be implied based on a generic definition that logically encompasses the sovereign entity. *See Atascadero*, *supra*, 473 U.S. at 245, 105 S.Ct. 3142.

Finally, in a number of statutes, Congress has clearly considered Indian tribes to be different from other forms of "government," and needing separate and distinct appellation. *See* 7 U.S.C. § 8310 (listing "States or political subdivisions of States, national governments of foreign countries, domestic or international organizations, Indian Tribes and other persons"); 42 U.S.C. § 9601(16) ("CERCLA") (listing "any State or local government, any foreign government, any Indian Tribe"); 16 U.S.C. § 698v-4 (listing "Federal, State, and local governmental units, and [] Indian Tribes and Pueblos"); 49 U.S.C. § 5121 (listing "a unit of State or local government, an Indian Tribe, a foreign government").

While one may question the historical legitimacy of the doctrine, and one may be uncomfortable with the notion that Indian tribes are subject to many laws

yet in many cases we are powerless to enforce them against the tribes, and while one may find it tempting to deduce that Congress actually meant to include Indian tribes when it employed the catchall phrase "other domestic governments," notwithstanding the fact that Indian tribes are not mentioned by name in any provision of the Bankruptcy Code, this Court has recent, explicit direction from the Supreme Court rejecting this interpretation. This Court is instructed in *Bay Mills* that Indian tribes retain every bit of sovereign immunity they have historically possessed and that, absent clear, unequivocal and unmistakable language abrogating that immunity, it is not our place to lightly depart from centuries of unwavering judicial deference to Congress's role in defining with exactitude the instances in which it is appropriate to abrogate the sovereign immunity of Indian tribes. The Litigation Trustee concedes that if this Court finds any ambiguity in § 106(a), it cannot conclude that the language is clear, unequivocal and unmistakable and must favor the Indian tribes and uphold their immunity from suit.

This Court cannot say with "perfect confidence" that the phrase "other domestic government" unambiguously, clearly, unequivocally and unmistakably refers to Indian tribes. The Bankruptcy Court's conclusion does not give appropriate deference to the Supreme Court's recent admonition that "[t]he special brand of sovereignty the tribes retain—both the nature and its extent—rests in the hands of Congress." *Bay Mills*, 134 S.Ct. at 2037. While Congress may not have to utter "magic words," Supreme Court precedent clearly dictates that it utter words that beyond equivocation or the slightest shred of doubt mean "Indian tribes." Congress did not do so in

sections 106(a) and 101(27) of the Bankruptcy Code and thus the Tribe is entitled to sovereign immunity from suit in the underlying MUFTA proceeding.

IV. CONCLUSION

For the foregoing reasons, the Court REVERSES the ruling of the Bankruptcy Court, holds that the Tribe is entitled to sovereign immunity from suit in this MUFTA proceeding and REMANDS the matter to the Bankruptcy Court for further proceedings on the issue of waiver of sovereign immunity, as outlined in the Bankruptcy Court's December 23, 2010 Stipulated Order.

IT IS SO ORDERED.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bankruptcy No. 08-53104
Adversary Pro. 10-05712

IN RE: GREEKTOWN HOLDINGS, LLC, ET AL.,
Debtors.

BUCHWALD CAPITAL ADVISORS, LLC,
SOLELY IN ITS CAPACITY AS LITIGATION TRUSTEE
FOR THE GREEKTOWN LITIGATION TRUST,
Plaintiff,

v.

DIMITRIOS ("JIM") PAPAS, ET AL.,
Defendants.

[Signed August 12, 2014]

OPINION DENYING RENEWED AND SUPPLEMENTED MOTION TO DISMISS OF DEFENDANTS SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND KEWADIN CASINOS GAMING AUTHORITY (DKT. 453)

WALTER SHAPERO, Bankruptcy Judge.

INTRODUCTION

Plaintiff, as Litigation Trustee, seeks to avoid transfers made by a debtor corporation to several parties, arguing that the transfers were fraudulent transfers under applicable Michigan law. Two Defendants, an Indian tribe and its political subdivision, moved to dismiss on the basis of sovereign immunity. The motion is denied.

BACKGROUND

The Litigation Trustee ("Plaintiff") seeks to avoid aspects of a restructuring and financing transaction whereby Greektown Holdings, LLC, a Debtor, directly or indirectly transferred money to multiple parties, including the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Kewadin Casinos Gaming Authority (together, "the Tribe Defendants").[1] Plaintiff brought this fraudulent transfer action under 11 U.S.C. §§ 544 and 550, incorporating Mich. Comp. Laws §§ 566.34 and 566.35. Shortly thereafter, the Tribe Defendants moved to dismiss the adversary proceeding as to themselves, asserting Indian tribal sovereign immunity. Dkt. 8. Upon stipulation by Plaintiff and the Tribe Defendants, the Court entered an order bifurcating these two sovereign immunity issues: (1) Whether Congress abrogated the Tribe Defendants' sovereign immunity by enacting 11 U.S.C. § 106; and (2) whether the Tribe Defendants consensually waived their sovereign immunity. Dkt. 85. This opinion deals solely with the former issue, with the latter issue remaining in abeyance. The

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[1] In an order entered on June 13, 2008 in the main Chapter 11 case (Case No. 08-53104, Dkt. 114), these several bankruptcies were consolidated for procedural purposes only and became jointly administered. In an order entered on April 22, 2010 in the main Chapter 11 case (Dkt. 2279), the Court granted the Official Committee of Unsecured Creditors ("Committee") authority to pursue bond avoidance claims on behalf of Greektown Holdings, LLC. In accordance with that order, the Committee initiated this adversary proceeding on May 28, 2010. Through a consent order entered in this adversary proceeding on August 14, 2010 (Adv. Pro. No. 10-05712, Dkt. 64), Buchwald Capital Advisors, LLC, solely in its capacity as Litigation Trustee for The Greektown Litigation Trust, substituted in for the Committee, and thereafter has prosecuted this action.

Court entertained briefs, held a hearing, and took the matter under advisement.

Plaintiff and the Tribe Defendants then reached a settlement. The District Court withdrew its reference of this matter and entered a settlement order. Other Defendants, who had previously objected to aspects of the District Court's settlement order, appealed it. The Sixth Circuit Court of Appeals agreed with them, to an extent, and remanded to the District Court. A fuller discussion of the procedural history (which is not of particular relevance to this opinion) can be found in that remanding opinion: *Papas, et al. v. Buchwald Capital Advisors, LLC, et al.*, 728 F.3d 567 (6th Cir. 2013). Thereafter, Plaintiff and the Tribe Defendants unsuccessfully mediated this matter as part of global settlement discussions. It appearing that those settlement discussions are no longer being presently pursued, the Tribe Defendants renewed and supplemented their motion to dismiss. Dkt. 453. The Court again entertained briefs, held a hearing, and took the matter under advisement.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(H). The Court has jurisdiction under 28 U.S.C. §§ 1334(b) and 157, and E.D. Mich. L.B.R. 83.50(a).

MOTION TO DISMISS STANDARD

Fed.R.Bankr.P. 7012 incorporates Fed.R.Civ.P. 12(b)(1) and provides that a party may by motion assert the defense of lack of subject-matter jurisdiction. The Court must assume that the allegations in Plaintiff's complaint are true and Plaintiff bears the burden of proving jurisdiction in order to survive a motion to dismiss. *3D Sys., Inc. v. Envisiontec, Inc.*, 575 F. Supp. 2d 799, 802-03 (E.D. Mich. 2008).

DISCUSSION

The Legal Issue and the Standard for Abrogation of Tribal Sovereign Immunity

11 U.S.C. § 106(a) provides: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections . . . 544 . . . [and] 550." In turn, "governmental unit" is defined in § 101(27).

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

These statutes do not specifically mention "Indian tribes," nor does any other provision in the Bankruptcy Code. *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000). The specific legal issue is whether the phrase "or other foreign or domestic government" includes Indian tribes and thus abrogates their sovereign immunity for purposes of the Bankruptcy Code.

The Supreme Court has referred to and described Indian tribes as follows:

> Indian tribes are "'domestic dependent nations'" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (*Potawatomi*) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes

> are subject to plenary control by Congress. *See United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("[T]he Constitution grants Congress" powers "we have consistently described as 'plenary and exclusive'" to "legislate in respect to Indian tribes"). And yet they remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

Michigan v. Bay Mills Indian Cmty., —— U.S. ——, 134 S.Ct. 2024, 2030, 188 L.Ed.2d 1071 (2014). Congressional actions abrogating tribal sovereign immunity must be clear, unequivocal, and not to be lightly assumed by a court. *Id.* at 2031-32. Even if an Indian tribe is subject to a law of general applicability, it is not necessarily subject to suit thereunder unless sovereign immunity is abrogated. *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999) (discussing *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 755, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)). "Evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). It must be said with "perfect confidence" that Congress intended to abrogate sovereign immunity and "imperfect confidence will not suffice." *Id.* at 231, 109 S.Ct. 2397. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). As one court artfully stated, "If there were no thumbs on the interpretive scale, the

question of intent reasonably could be decided either way and that exemplifies ambiguity. Because there is ambiguity, the thumb that presses down in favor of tribal sovereign immunity tips the balance." *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1210 (11th Cir. 2009) (citations omitted).

In essence, and as will be further discussed, the Court takes the Tribe Defendants' argument to be that, in light of the foregoing pronouncements, (a) for a statute to abrogate tribal sovereign immunity, it must specifically use the words "Indian tribes" (or perhaps some synonymous verbiage); and (b) if the statute does not use such verbiage, and irrespective of any other language used, the purported abrogation fails to meet the foregoing pronouncements and is not effective as to Indian tribes.

A. *Parsing the Language of § 101(27), Are Indian Tribes "Other Foreign or Domestic Governments"?*

One aspect of this definition can be easily eliminated from consideration: "foreign governments." The Supreme Court has found or stated that Indian tribes are unique entities, but has also indicated that they are not "foreign governments" per se. "Although we early rejected the notion that Indian tribes are 'foreign states' for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments." *Santa Clara Pueblo*, 436 U.S. at 71, 98 S.Ct. 1670 (citation omitted); *see also Bay Mills Indian Cmty.*, 134 S.Ct. at 2040-41 (2014) (Sotomayor, J., concurring) ("Indian Tribes have never historically been classified as 'foreign'

governments in federal courts even when they asked to be . . . . Two centuries of jurisprudence therefore weigh against treating Tribes like foreign visitors in American courts."). The Commerce Clause of the U.S. Constitution distinguishes Indian tribes from "foreign nations," providing: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Art. 1, § 8, cl. 3. This Court is thus satisfied that Indian tribes are not "foreign governments" within the definition of § 101(27).

B. *If Indian Tribes are not "Foreign Governments," are they "Governments" in the First Place?*

The Tribe Defendants stress that the Supreme Court has gone to extraordinary lengths to avoid calling Indian tribes "governments." The Supreme Court has predominantly relied on the nomenclature "domestic dependent nations." *See Bay Mills Indian Cmty*., 134 S.Ct. at 2030 (2014). Congress is presumed to be aware of such when enacting legislation.[2] The Tribe Defendants rely upon one of two relevant appellate court cases, which opined:

> Indeed, while the Supreme Court has referred to Indian tribes as "sovereigns," "nations," and even "distinct, independent political communities, retaining their original natural rights," the trustees cite no case in which the Supreme Court has referred to an Indian tribe as a "government" of any sort—domestic, foreign, or otherwise. The apparent care taken by the Supreme Court not to refer to Indian tribes as "governments" reinforces

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[2] The parties did not cite to or substantially discuss any legislative history of the Bankruptcy Code, nor would the Court be inclined to consider such in any event, given the nature of the inquiry.

> Justice Marshall's pronouncement in *Cherokee Nation* that Indian tribes are exceptionally unique, unlike any other form of sovereign, which is why he coined the phrase "domestic dependent nation." If the Supreme Court considered an Indian tribe to be a "government," it would not go to such great lengths to avoid saying so.

In re Whitaker, 474 B.R. 687, 695 (8th Cir. BAP 2012) (footnote omitted). The other relevant appellate case, relied upon by Plaintiff, opined:

> Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states).
>
> The Supreme Court has recognized that Indian tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi*, 498 U.S. at 509, 111 S.Ct. 905 (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)); *see also, Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are "domestic" sovereigns). So the category "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.
>
> . . . no definition in the Bankruptcy Code actually lists "Indian tribes" as either a foreign or domestic government. However, in enacting the Bankruptcy code, Congress was legislating

> against the back-drop of prior Supreme Court decisions, which do define Indian tribes as domestic nations, i.e., governments, as well as against the ordinary, all-encompassing meaning of the term "other foreign or domestic governments."

Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1057-59 (9th Cir. 2004), *cert. denied*, 543 U.S. 871, 125 S.Ct. 99, 160 L.Ed.2d 118 (2004).

Plaintiff also directs this Court's attention to a recent concurring opinion that stated "[b]oth States and Tribes are domestic governments . . ." *Bay Mills Indian Cmty.*, 134 S.Ct. at 2042 (Sotomayor, J., concurring). The Tribe Defendants argue that such language has little, if any, precedential value and does not relate to Congressional intent at the time it wrote the relevant statutes. While that pronouncement was not crucial or essential to that decision, or dispositive in this case, it does express such a point of view, for whatever it is worth. It does not weigh materially in this Court's analysis or conclusion.

Noting those quoted and conflicting appellate cases, this Court finds *Krystal Energy* far more persuasive than *In re Whittaker* on this point. Indian tribes are clearly and unequivocally "governments," despite their uniqueness. This Court could delve into an examination into the nature, function, and purpose of Indian tribes and whether they indeed "govern." *Compare Bay Mills Indian Cmty.,* 134 S.Ct. at 2030 (Indians tribes hold "governmental powers and attributes"), *with In re Whitaker*, 474 B.R. at 693 ("Granted, Indian tribes can and do provide certain governmental functions for their members. But the several steps needed to justify the holding in these cases is far from an unequivocal expression of Con-

gressional intent to abrogate the tribes' immunity . . ."). The Court could also compare and contrast a "government" and a "nation" (something not substantially discussed by the parties). But in any event, these inquiries would beg a more basic question: what sort of entities hold sovereign immunity? By the very definition of sovereign immunity, only *governmental* entities hold it. Black's Law Dictionary (9th ed. 2009) defines "sovereign immunity" as "[a] *government's* immunity from being sued in its own courts without its consent. . . . Also termed *government* immunity; *governmental* immunity." (emphasis added). *See* § 106(a) (". . . sovereign immunity is abrogated as to a governmental unit . . ."). Thus, if an entity holds sovereign immunity, it is perforce a "governmental" entity.[3]

C. *Having Determined that Indian Tribes are Governments, are they "Domestic Governments"?*

The reference to "foreign or domestic government" in § 101(27) logically creates dichotomy: either something is domestic, or otherwise it is foreign. *Krystal Energy*, 357 F.3d at 1057. The dichotomy is a territorial one. *See id.* The Supreme Court has long recognized that Indian tribes are territorially domestic, opining:

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[3] Plaintiff also argued (attaching supporting exhibits) that Indian tribes have been referred to as "governments" by the Bureau of Indian Affairs, past Presidents of the United States, and the National Congress of American Indians. Plaintiff contends these statements validate and reinforce its construction of the term "government." The Tribe Defendants respond that (a) such statements are irrelevant to the analysis; and (b) Plaintiff's resorting to such secondary sources actually undercuts Plaintiff's position that Indian tribes are *clearly and unequivocally* governments. Noting these arguments, the Court does not consider any of these statements or the supporting exhibits to weigh materially in its analysis or conclusion.

> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens.

Cherokee Nation, 5 Pet. at 17. Similarly:

> This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory—a territory which originated under our constitution and laws.

U.S., to Use of Mackey v. Coxe, 59 U.S. 100, 103, 18 How. 100, 15 L.Ed. 299 (1855). The Supreme Court has otherwise described Indian tribes as "domestic" in nature, echoing that the dichotomy is indeed a territorial one. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) ("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic."). The definitions stated in Black's Law Dictionary support this conclusion, as discussed by *In re Mayes*, 294 B.R. 145, 158-59 (10th Cir. BAP 2003) (McFeeley, J., dissenting):

> The word "domestic" means "pertaining, belonging, or relating to a home, a domicile, or to the place of birth, origin, creation or transaction." A government is "that form of fundamental rules

> and principles by which a nation or state is governed, or by which individual members of a body politic are to regulate their social actions." So a domestic government would be a group within the lands of the United States that operates through some form of ruling principles.

(footnotes omitted). Indian tribes fall within this definition.

This Court's conclusion is reinforced by several other factors. First, the adjective "domestic" has been used by the Supreme Court to describe Indian tribes for almost two centuries. It is not relevant that this adjective was used to modify "dependent nation" rather than "government." Second, Indian tribes must logically fall somewhere in the foreign/domestic dichotomy. Because the Court has previously concluded that Indian tribes are not foreign, as a matter of logic, they must perforce be domestic. The Tribe Defendants argue that because Indian tribes are unique, they are "tribal governments," i.e. part of a separate category that transcends the foreign/domestic dichotomy. It cannot be logically said that, because an entity is unique and borrows some characteristics from both categories in a dichotomy, that it falls wholly outside both categories. Further, the dichotomy requires a territorial inquiry, not an inquiry into the nature, purpose, or function of the entity.[4] For those reasons, the Court finds

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[4] Query: would the unique or peculiar status of the Holy See (otherwise known as the Vatican) necessarily preclude it from being within the Bankruptcy Code's definition of "foreign state; department, agency, or instrumentality of . . . a foreign state; or other foreign . . . government"? Could the Holy See successfully argue that it is in a separate category of "ecclesiastical government" that somehow transcends the foreign/domestic dichotomy? The Court strongly doubts it, given the breadth of the

that Indian tribes are "domestic governments" within the meaning of § 101(27).

D. *If Indian Tribes Do Not Fall Under the Term "Other Domestic Governments," What Else Does?*

This question further reinforces the Court's conclusion that Indian tribes are "domestic governments." Congress expanded the scope of "governmental unit" by adding the phrase "or other foreign or domestic government." "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Kirtsaeng v. John Wiley & Sons, Inc.*, —— U.S. ——, 133 S.Ct. 1351, 1379, 185 L.Ed.2d 392 (2013) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)). "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008), *cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("the standard principles of statutory construction do not have their usual force in cases involving Indian law."). With that in mind, this Court is extremely hesitant to wholly erase the phrase "or other . . . domestic government" from the Bankruptcy Code. Congress would not include this phrase if it was a meaningless nullity. Similarly, this Court should not act to

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statutory definition and the fact the Holy See is territorially "foreign" to the United States. *See also Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) (discussing the Holy See's immunity under the Foreign Sovereign Immunities Act and its limitations).

transform that phrase into a meaningless nullity. Therefore, if Indian tribes do not comprise or fall under "other . . . domestic government," there must be some other domestic government that was not enumerated and that gives meaning to the phrase.

Upon being so questioned at the most recent hearing, counsel for the Tribe Defendants was unable to provide such an example. This presents a serious problem with the Tribe Defendants' position. Other Courts have also faced this question and been unable to provide such an example.

> But the Nation has not suggested, either in its memoranda or at oral argument, any possible other meaning of "domestic government" that would not include Indian tribes. Indeed, since the meaning of "or other foreign or domestic government" cannot include the United States, or a State, Commonwealth, Territory or District, or a municipality, or a foreign state, or an agency, department or instrumentality of any of them, because they are all expressly mentioned, it is difficult if not impossible to come up with any possible meaning for "other domestic government" *except* Indian tribes. Without another reasonable plausible alternative meaning, the abrogation of sovereign immunity as to all domestic governments is not equivocal. It could hardly be more absolute.

In re Russell, 293 B.R. 34, 41 (Bankr. D. Ariz. 2003) (emphasis original) (footnote omitted). Similarly, one thoughtful dissent[5] stated:

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[5] The majority opined that the appellant abandoned the tribal sovereign immunity argument. It did, however, include dictum in a footnote, stating that Indian tribes "probably are not" domestic governments. *Id.* at 148 n. 10.

> An important statutory maxim of interpretation requires a court to give operative effect to every word Congress used. Because in § 101(27) all other forms of domestic government prior to the semicolon are enumerated, if the phrase following the semicolon is not read as referring to Indian tribes and other indigenous peoples, the phrase becomes meaningless. There are no other forms of domestic government that have not already been specified.

In re Mayes, 294 B.R. at 159 (McFeeley, J., dissenting) (footnote omitted). The Court concludes that the only rational, non-absurd explanation is that the phrase "other . . . domestic government" is comprised exclusively of Indian tribes. To draw an analogy, imagine Congress enacted a statute that stated "red, white, and any other color appearing on the flag of the United States of America." As a matter of logic, that statute would have to be construed to clearly and unequivocally include "blue."

Nor is the Court is not persuaded by the Tribe Defendants' argument based on *ejusdem generis*, which is defined by Black's Law Dictionary (9th ed. 2009) as "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *See United States v. Mabry*, 518 F.3d 442, 447 (6th Cir. 2008). The Tribe Defendants argued that "other . . . domestic government" must be construed as limited to the types of entities with the same characteristics as those specifically enumerated (such as, for example, states or municipalities). In the Tribe Defendants' view, that would only include entities that are "comparable" to a state or municipality.

That argument fails because the Tribe Defendants do not (and indeed *cannot*) prove that there exist entities that are "comparable" to states and municipalities that are not already encompassed by the enumerated terms "state" and "municipality."[6] *Ejusdem generis* is inapplicable, at least as the Tribe Defendants would employ it. In fact, an argument could be made that *ejusdem generis* supports a finding that "other . . . domestic government" includes Indian tribes. The commonality between the enumerated entities and Indian tribes is that they all hold sovereign immunity and are all governmental entities.

E. *It is not Dispositive that, in Other Statutory Schemes, Congress has Explicitly Referred to "Indian Tribes"*

The Tribe Defendants argue that, because Congress has, on several other occasions, explicitly used the words "Indian tribe" (or similar language) when abrogating tribal sovereign immunity, that Congress' failure to include such words in § 101(27) of the Bankruptcy Code is indicative that it did not intend to do so here. The Tribe Defendants cite to several examples relative to abrogation of tribal sovereign immunity.[7] Some key examples include the following, first:

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[6] In case there was any doubt as to the broad scope of the Bankruptcy Code's definition of "governmental unit," § 101(40) further provides that: "[t]he term 'municipality' means political subdivision or public agency or instrumentality of a State."

[7] The Tribe Defendants also cite several instances in which Congress made clear its intent to include Indian tribes within the scope of other statutory schemes (but not necessarily with regard to abrogating tribal sovereign immunity): 7 U.S.C. § 8310 ("Indian tribes"); 42 U.S.C. § 9601(16) ("any Indian tribe"); 16

> Indian tribes are expressly subjected to the Act's preemption rules. Every relevant subsection of section 1811 contains the language "state or political subdivision thereof or Indian tribe." *See* 49 U.S.C.App. § 1811(a)-(d). The Act's plain language indicates that, sovereign immunity notwithstanding, states and Indian tribes are subject to the preemption rules, including the provision that allows preemption cases to be brought in "any court of competent jurisdiction." 49 U.S.C.App. § 1811(c)(2). This language is sufficient to constitute an express waiver of tribal sovereignty.

N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462 (8th Cir. 1993) (discussing the Hazardous Materials Transportation Act). Second:

> We hold that where Congress grants an agency jurisdiction over all "persons," defines "persons" to include "municipality," and in turn defines "municipality," to include "Indian Tribe[s]," in establishing a uniform national scheme of regulation of so universal a subject as drinking water, it has unequivocally waived tribal immunity. We note that Congress could have been more clear. Congress could have included a provision directly

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U.S.C. § 698v-4 ("Indian Tribes and Pueblos"); 49 U.S.C. § 5121(g) ("Indian tribe"); 42 U.S.C. § 8802(17) ("any Indian tribe or tribal organization"); 42 U.S.C. § 6372 ("the recognized governing body of an Indian tribe (as defined in section 6862 of this title) which governing body performs substantial governmental functions"); 42 U.S.C. § 4762(5) ("the recognized governing body of an Indian tribe, band, pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 et seq.], which performs substantial governmental functions.").

> stating its intent to waive tribal immunity. However, "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (noting Congress need not state in "so many words" its intent to abrogate state sovereign immunity).

Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor, 187 F.3d 1174, 1182 (10th Cir. 1999) (alteration in original) (discussing the Safe Drinking Water Act). Third:

> Congress also decided to regulate the disposal of discarded materials on reservations. Under the RCRA, citizens are permitted to bring compliance suits "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency * * *) who is alleged to be in violation * * *." 42 U.S.C. § 6972(a)(1)(A). "Person" is subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities include "an Indian tribe or authorized tribal organization * * *." 42 U.S.C. § 6903(13)(A). *See also* House Report, *supra* note 1, at 37, USCAN 6275 (specific examples of harm to be avoided, including Indian children playing in dumps on reservations); *State of Washington Dep't of Ecology v. E.P.A.*, 752 F.2d 1465, 1469-71 (1985) (RCRA applies to Indian tribes). It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.

Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir.1989) (alterations in original) (footnote omitted) (discussing the Resource Conservation and Recovery Act).

What can be gleaned from these examples is that an explicit reference to "Indian tribes" in a statute is sufficient for Congress to clearly and unequivocally abrogate tribal sovereign immunity. However, just because that is *sufficient* does not mean it is *required*. The Court in *In re Russell*, 293 B.R. at 43 was also presented with an argument similar to that made by the Tribe Defendants and found it to be "a rather weak inductive argument" because, although the use of the phrase "Indian tribe" may be a powerful statement, it is not the only way Congress can abrogate tribal sovereign immunity. Although Congress did not use the most powerful tool at its disposal here (the proverbial "magic words" of "Indian tribe" or some synonymous verbiage), the words it did use, in light of the totality of the foregoing analysis, warrant the conclusion that Congress had the clear, unequivocal, and unambiguous intent to abrogate tribal sovereign immunity.[8] In this connection, the Supreme Court recently opined:

> Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that

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[8] This logically raises the question of what verbiage, other than "Indian tribes," might suffice to clearly and unequivocally abrogate the Tribe Defendants' sovereign immunity. For instance, which of the following phrases might meet this standard if included in the statute?

(a) "any entity able to assert sovereign immunity"

(b) "domestic dependent nations"

(c) "organizations of indigenous peoples"

(d) "tribal nations"

(e) "the Navajo Nation, the Coushatta Tribe of Louisiana, and all similar entities and organizations"

> Congress use magic words. To the contrary, we have observed that the sovereign immunity canon "is a tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008). What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.

F.A.A. v. Cooper, —— U.S. ——, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012) (alteration in original) (Privacy Act provided for recovery of "actual damages" from the United States, but such did not unequivocally waive its sovereign immunity for other damages that are beyond the scope of "actual damages"). A court should not enlarge a statute's waiver of sovereign immunity beyond what a fair reading of the language requires. *See id.* "Congress need not use magic words to waive sovereign immunity, but the language it chooses must be unequivocal and unambiguous." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (citation omitted). "The only way Congress could have been clearer would have been to say 'this act abrogates state sovereign immunity.' But the Supreme Court has made it quite plain that such magic words are unnecessary." *Alaska v. EEOC*, 564 F.3d 1062, 1066-67 (9th Cir. 2009) (statute that authorized state employees to recover damages payable by their employer was deemed to abrogate state sovereign immunity, despite the statute not mentioning abrogation, sovereign immunity, or the Eleventh Amendment). This Court thus concludes that Congress made its intent

unequivocally, perfectly, and sufficiently clear, despite not using the "magic words."

The Court is also not persuaded by the Tribe Defendants' reliance on *Florida Paraplegic Ass'n, Inc., v. Miccosukee Tribe of Indians of Florida*, in which that Court held that "the absence of any reference to Indian tribes in the former statute stands out as a stark omission of any attempt by Congress to declare tribes subject to private suit for violating the ADA's public accommodation requirements." 166 F.3d at 1132 (footnote omitted). But that act did not contain a provision abrogating the sovereign immunity of all domestic governments. *In re Russell*, 293 B.R. at 44. The ADA only explicitly abrogated the sovereign immunity of states under the Eleventh Amendment to the U.S. Constitution, which its legislative history confirmed. *Fla. Paraplegic Ass'n*, 166 F.3d at 1133. Because, in this case, there exists the phrase "other . . . domestic governments," which can only be interpreted to mean "Indian tribes," particularly in light of the all-inclusive enumeration in the statute of other domestic governments, *Florida Paraplegic* is not particularly helpful to the Tribe Defendants.

F. *The Court's Conclusion that Congress Abrogated Tribal Sovereign Immunity Satisfies the Applicable Standard as being Perfectly Clear, Unequivocal, and not Implied*

The Tribe Defendants argue that the mere fact that this legal question is so disputed is indication that (a) there is no clear or unequivocal Congressional intent to abrogate tribal sovereign immunity; and (b) there is no way to conclude that Congress abrogated tribal sovereign immunity without such being implied. They note that there are two sharply conflicting appellate cases on this exact issue. *Compare*

Krystal Energy, 357 F.3d 1055, *with In re Whitaker*, 474 B.R. 687. (One might even argue that the very length of this Court's own opinion is itself indicative that any such Congressional intent is less than perfectly clear.)

Certainly, Congressional intent to abrogate tribal sovereign immunity cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670. *In re Russell* provides an important discussion on the meaning of the word "imply," particularly as relates to this legal issue.

> The first possible meaning is "to impute or impose on equitable or legal grounds." This usage is unique to legal writing, and very common in legal writing, and is therefore is the most likely usage the [Supreme] Court intended. This is the usage when courts imply a contract, a trust, or a promise that was never actually made or even suggested. Perhaps the usage closest to the present context is when courts imply a private right of action in a statute. When they do so, they are not using the term in its ordinary English usage, because the court's holding is express rather than implied, and usually the court is not suggesting that the Congress or legislature consciously intended there to be a private right of action but only indicated it by implication. Instead, the court is imposing it because it is equitable to do so, just as a promise or a contract may be implied when a party acts to its detriment in reliance on another's statement or conduct. That is a particularly apt meaning in this context, because it means the Court is saying that abrogation of sovereign immunity cannot be implied in the same way a right of action might be implied even when the statutory language is silent on

> the subject. Under that meaning, however, there can be no argument that application of § 106(a) to tribes would be to imply an abrogation of sovereign immunity, because the language of § 106 is quite express. To apply § 106 to tribes would not be "to impute or impose" a legal right or obligation on which the statute is silent but is merely to apply the express words of the statute.
>
> The second possible meaning is "to read into (a document)." This means to infer a meaning that the author probably intended but is not found in the express words of the document. Perhaps, for example, the authors of the Constitution implied a right of privacy even though no words make that intention express. Again, however, it is clear that under this meaning the abrogation of sovereign immunity was not merely implied by Congress, because it is express in § 106. Concluding that §§ 101(27) and 106(a) include Indian tribes is not to conclude the authors implied something without making it express, but merely to apply what is expressly said. So under this meaning as well there is no violation of the Court's proscription against abrogation by implication in concluding that § 106 includes Indian tribes.

293 B.R. at 38-39 (footnotes omitted). Nothing in this Court's opinion is within either of these two definitions of "imply." In the Court's opinion, there is a material difference between (a) determining the scope or extent of an explicitly stated abrogation of sovereign immunity, as is the issue here; and (b) determining whether there was any abrogation in the first place where the statute is silent on the matter. *e.g. Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920 (6th Cir. 2009);

Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2d Cir. 2000).

In the Court's opinion, the most important lesson from *In re Russell* is that implication is distinguishable from deduction.[9] Black's Law Dictionary (9th ed. 2009) defines deduction as "[t]he act or process of reasoning from general propositions to a specific application or conclusion." For example, the Bankruptcy Code does not specifically list "Arizona" in its definition of governmental units whose sovereign immunity is abrogated. But that conclusion can be deduced by a simple syllogism: sovereign immunity is abrogated as to states; Arizona is a state; therefore sovereign immunity is abrogated as to Arizona. *In re Russell*, 293 B.R. at 41. Similarly, it can be said that sovereign immunity is abrogated as to "other . . . domestic governments," Indian tribes are "other . . . domestic governments" (and indeed they are the *only* "other . . . domestic governments"), therefore sovereign immunity is abrogated as to Indian tribes. That Court further reasoned:

> Implication and inference are the rhetorical versions of induction, drawing conclusions from examples. For example, if the last phrase ["other foreign or domestic government"] were eliminated from § 106(a), one might draw the inference that because sovereign immunity is expressly abrogated as to the United States, the States, the Commonwealths, the Districts, and foreign governments, Congress must have intended to abrogate it as to all governments. That would be reason-

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[9] That is true notwithstanding the fact that the *In re Russell* Court's discussion of this point initially noted that the third possible meaning of "imply" ("to infer") was described to be an erroneous definition. *Id.* at 39.

> ing by implication or inference. While that might be equally as sound, and in fact how all new knowledge is achieved, it nevertheless retains the possibility for error. The [Supreme] Court may well have intended to proscribe this method of concluding that there has been an abrogation of sovereign immunity, but the Court has not similarly proscribed that conclusion when reached by deduction. But because the statute expressly abrogates sovereign immunity as to all domestic governments, the statute applies to Indian tribes by deduction rather than by implication, so the conclusion is not proscribed by the Court's limitations. In other words, the proscription against abrogation by implication does not require the listing or naming of each government as to which it applies so long as they are unequivocally identified by the statute.

Id. (footnote omitted). This Court disagrees with *In re Nat'l Cattle Cong.* on the point that abrogation of tribal sovereign immunity can only be inferred from this statute. 247 B.R. at 267.

In sum, although Indian tribes have a "thumb on the interpretive scale" tending to tip the balance in their favor in the event of an ambiguity or lack of clarity, that does not come into play because, in this Court's view, Congress sufficiently, clearly, and unequivocally intended to abrogate their sovereign immunity in the subject statute.

CONCLUSION

For the foregoing reasons, Plaintiff has met its burden and the Tribe Defendants' motion to dismiss is denied. Plaintiff shall present an appropriate order.

STATUTORY PROVISIONS INVOLVED

1. Section 101(27) of the Bankruptcy Code, 11 U.S.C. § 101(27), provides:

§ 101. Definitions

In this title the following definitions shall apply:

* * *

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

* * *

2. Section 106 of the Bankruptcy Code, 11 U.S.C. § 106, provides:

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be

offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

3. Section 544 of the Bankruptcy Code, 11 U.S.C. § 544, provides:

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser

and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

4. Section 550 of the Bankruptcy Code, 11 U.S.C. § 550, provides:

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under subsection (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

CONSTITUTION AND BYLAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

CONTENTS

HISTORY NOTE:

Effective Date: November 13, 1975

The modern governmental organization of the Tribe traces to the Sugar Island Group of Chippewa Indians and Their Descendants, which was incorporated under Michigan law on December 24, 1953. The name of the corporation and of the Tribe was changed to the Original Bands or the Sault Ste. Marie Chippewa Indians and Their Heirs on February 28, 1959, and it was as the Original Bands that the group sought federal recognition as an Indian tribe.

The Tribe was accorded federal recognition by memorandum of the Commissioner of Indian Affairs on September 7, 1972. Land was first taken in trust for the Tribe by deed dated May 17, 1973, and approved by the Area Director for the Bureau of Indian Affairs on March 7, 1974. The Commissioner of Indian Affairs formally declared the trust land to be a reservation for the Tribe on February 20, 1975, with notice published in the Federal Register on February 27, 1975. (40 Fed. Reg. 8367).

The Tribe sought organization of its tribal government under a constitution adopted pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. s. 476. An election on a constitution supervised by the Secretary of the Interior pursuant to that statute was ordered on May 30, 1975. The Tribe submitted its present constitution and bylaws for approval by Secretarial election by Resolution No. 6-27-75A, adopted June 18, 1975. The constitution and bylaws were adopted by the tribal membership at an election conducted on October 9, 1975.

The Constitution and Bylaws were approved by the Acting Deputy Commissioner of Indian Affairs on

November 13, 1975, and went into effect on that date.

Amendments:

The Constitution and Bylaws have been amended once, replacing Article IV, Section 3 which previously read "The members of the board shall be qualified voters of the tribe, eighteen (18) years of age or over." This amendment was voted on and approved by the members of the Tribe on May 1, 2007.

Amendment II, adopted and approved on April 7, 2010, amends Article II, Sec. 1, of the Bylaws in the Constitution by removing the duties as the chief executive officer from the Tribal Chairperson.

Cases:

City of Sault Ste. Marie v. Andrus, 458 F Supp 465 (D DC 1978) Action by City to challenge US taking of land within city in trust for the Tribe; motion to dismiss granted in part and denied in part.

City of Sault Ste. Marie v. Andrus, 532 F Supp 157 (D DC 1980) Tribe was properly organized under the Indian Reorganization Act; city land use regulations do not apply on tribal trust land

United States v. Michigan, 471 F Supp 192 (WD Mich 1979) Tribe is a political successor in interest to the Chippewa signatories to the Treaty of 1836; Treaty of 1855 did not dissolve the Tribe.

CONSTITUTION

PREAMBLE

We, the members of the tribe known as the Sault Ste. Marie Tribe of Chippewa Indians, in order to provide for the perpetuation of our way of life and the welfare and prosperity of our people, to preserve our right of self-government, and to protect our property and resources, do ordain and establish this constitution and bylaws.

ARTICLE I – NAME

The name of this organization shall be the Sault Ste. Marie Tribe of Chippewa Indians. Its members trace their ancestry to the six historical bands of the Sault Ste. Marie Chippewa Indians.

ARTICLE II – TERRITORY AND JURISDICTION

Section 1. The territory of the tribe shall encompass all lands which are now or hereafter owned by the tribe or held in trust for the tribe by the United States.

Sec. 2. The jurisdiction of the tribe shall extend to all of the lands of the tribe to the extent not inconsistent with Federal law and, further, for the purpose of exercising and regulating the rights to fish, hunt, trap and other usual rights of occupancy, such jurisdiction shall extend to all lands and waters described in the Treaty of March 28, 1836 (7 Stat. 491), and to all lands and waters described in any other treaties which provide for such rights to the extent such jurisdiction is not inconsistent with Federal law.

ARTICLE III – MEMBERSHIP

Section 1. The following persons shall be entitled to membership in the Sault Ste. Marie Tribe of Chippewa Indians, provided that such persons possess Indian blood and are not currently enrolled with any other tribe or band of North American Indians, and provided further that such persons are citizens of the United States of America:

(a) All persons descended from the six historical bands (Grand Island, Point Iroquois, Sault Ste. Marie, Garden River, Sugar Island, and Drummond Island Bands) of the Sault Ste. Marie Chippewa Indians whose names appear on any histori-

cal roll, census or record made by officials of the Department of the Interior or Bureau of Indian Affairs.

(b) All persons enrolled on the membership roll of the organization, known as the Original Bands of the Sault Ste. Marie Chippewa Indians who are alive on the date of approval of this constitution and who are descendants of the original bands.

(c) All persons who may hereafter be adopted into the tribe in accordance with any ordinance enacted for that purpose by the board of directors;

(d) All lineal descendants of such persons as are described in (a), (b) or (c) above.

Sec. 2. The board of directors shall have the power to enact ordinances consistent with this article to govern future membership, loss of membership and adoption.

ARTICLE IV – GOVERNING BODY

Section 1. The governing body of the Sault Ste. Marie Tribe of Chippewa Indians shall consist of a board of directors.

Sec. 2. A chairperson shall be elected at large by the voters of the tribe and shall serve as a member of the board of directors. The voters of each of the five (5) election units shall elect from within their qualified membership one member to the board to represent each five hundred (500) members or fraction thereof. Following each election, the board of directors shall select from within its membership a vice-chairperson, a treasurer and a secretary.

Sec. 3. The members of the board shall be qualified voters of the Tribe, eighteen (18) years of age or over. Any Person elected or appointed to a position on the board who is either an employee or independent

contractor of the Tribe shall voluntarily resign his or her employment position and/or surrender any rights under any contract with the Tribe prior to assuming the duties of office or taking the oath of office. Failure to voluntarily resign and/or terminate the contractual relationship with the Tribe shall bar the elected or appointed individual from assuming the duties of office or taking the oath of office.

Sec. 4. For the purpose of the first election held after adoption of this constitution, the chairperson and other members of the board of directors comprising fifty percent of those elected who have received the highest number of votes shall serve for a term of four years, or until their successors are duly installed in office. All other members shall serve a term of two years, or until their successors are duly installed in office. Thereafter, the term of office of the chairperson and directors shall be four years, or until their successors are duly installed in office.

ARTICLE V – NOMINATIONS AND ELECTIONS

Section 1. Within ninety (90) days after the approval of this constitution, the board of directors shall cause to be made a division of the eastern portion of the Upper Peninsula of the State of Michigan into five (5) election districts known as units, and shall conduct a census to determine the number of tribal members in each such unit. The boundaries shall be located with due regard to the historical location of each of the historical bands of the Sault Ste. Marie Chippewa Indians. At four year intervals beginning four years from the year of adoption of this constitution, the board of directors shall cause to be made a census and voter registration of the membership within each unit and shall publish no less than three (3) months

in advance of the next general election the results thereof.

Sec. 2. The first election of the chairperson and the board of directors shall be held within ninety (90) days after the creation of the election units under the arrangements and supervision of the present board of directors and the local Superintendent of the Bureau of Indian Affairs.

Sec. 3. The officers and members of the board of directors of the organization known as the Original Bands of Sault Ste. Marie Chippewa Indians holding office at the time of the adoption of this constitution shall continue in office and carry out the functions of the officers and board of directors of the tribe as prescribed by this constitution until the chairperson and board of directors are elected and duly installed in office pursuant to this article.

Sec. 4. Any person eighteen (18) years of age or over who is a member of the tribe shall be eligible to vote in tribal elections.

Sec. 5. In any general election called pursuant to this constitution, each eligible voter shall vote within his unit of residence. Voters residing outside of any unit shall register not less than three months prior to any election and vote in the unit of their choice.

Sec. 6. The board of directors shall enact appropriate ordinances to implement nominations and the holding of elections.

ARTICLE VI – VACANCIES AND REMOVAL FROM OFFICE

Section 1. If any tribal official shall die, resign, or be removed from office, the board of directors shall declare the position vacant.

Sec. 2. The board shall, by a majority vote, fill vacancies by appointment of a voting member of the tribe to fill the unexpired term of the departed official. Persons so appointed shall reside within the election unit from which the departed official was elected.

Sec. 3. Removal of the tribal chairperson or any member of the board of directors may be initiated by means of filing charges against such person with the board of directors in the form of a petition signed by at least one hundred (100) eligible voters which alleges specific facts which, if shown to be true, would establish that the official has engaged in conduct which constitutes a violation of this constitution and bylaws or any duly enacted tribal ordinance or resolution.

Sec. 4. All officials so charged shall be accorded the protection of the following procedure:

(a) The accused shall be served with a written notice of the charges against him or her within fifteen (15) days after receipt of the petition by the board of directors. Such notice shall state the date, time and place of the hearing provided for in subsection (b), but no such hearing shall be held less than fifteen (15) days from the date that notice is served.

(b) The accused shall have the right to be heard before a hearing board created by the board of directors for the specific purpose of hearing the charges and evidence against the accused. The hearing board shall decide whether the accused shall be removed from office within sixty (60) days after receipt of the petition. The decision of the hearing board shall be final.

Sec. 5. Any member of the board of directors who willfully fails to attend three (3) consecutive regular meetings of the board of directors may be removed from office by a majority vote of the board of directors only after such accused member has been given an opportunity to appear before the board of directors in his own defense. Persons so accused shall be noticed and afforded those protections as set forth in Section 4 of this article.

ARTICLE VII – POWERS

Section 1. The board of directors shall exercise the following powers, subject to any limitations imposed by the laws of the United States and subject further to all express restrictions upon such powers contained in this constitution and bylaws:

(a) To employ legal counsel, subject to the approval of the Secretary of the Interior;

(b) To negotiate and consult with the Federal, State and local governments on behalf of the tribe;

(c) To advise the Secretary of the Interior with regard to all appropriation estimates of Federal projects for the benefit of the tribe;

(d) To expend funds for public purposes of the tribe and to regulate the conduct of trade and the acquisition, use and disposition of property;

(e) To regulate the inheritance or testamentary disposition of real and personal property, other than property held in trust, of the members of the tribe;

(f) To provide for the commitment of incompetents and for the appointment and regulation of guardians for minors and incompetents, subject to review by the Secretary of the Interior;

(g) To promulgate and enforce ordinances governing the conduct of persons within the jurisdiction of

the tribe, to establish a reservation court and define its duties and powers;

(h) To exclude and remove from the tribal lands any person not legally entitled to be there;

(i) To adopt resolutions, ordinances and a code, subject to the review of the Secretary of the Interior, providing for the licensing, regulation and control of nontribal persons coming upon or being within the territory or jurisdiction of the tribe as defined in ARTICLE II of this constitution, for the purpose of recreational boating, hunting, fishing, trapping, gathering wild rice or other fruits of the earth or other usual rights of occupancy;

(j) To adopt resolutions, ordinances and a code, subject to review by the Secretary of the Interior, providing for the regulation and control of tribal members who hunt, fish, trap, gather wild rice or exercise other usual rights of occupancy upon or within the territory or jurisdiction of the tribe as defined in ARTICLE II of this constitution;

(k) As authorized by law, to manage, lease, sell, acquire or otherwise deal with the tribal lands, interest in lands and water or other tribal assets;

(l) To prevent the sale or disposition of any tribal lands, or other tribal assets;

(m) To manage any and all economic affairs and enterprises of the tribe and to engage in any business not contrary to Federal law that will further the economic development of the tribe or its members, and to use the tribal funds or other tribal resources for such purposes;

(n) To establish and delegate to subordinate boards, organizations, cooperative associations, tribal officers, committees, delegates or other tribal

groups, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power or to cancel any delegation.

Sec. 2. Any resolution or ordinance which by terms of this constitution is subject to review by the Secretary of the Interior shall be presented to the Superintendent of the designated Indian agency for this region within ten (10) days of its enactment, who shall, within ten (10) days after its receipt by him, approve or disapprove the same. If the Superintendent shall approve any ordinance or resolution it shall thereupon become effective, and the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of approval, rescind the said ordinance or resolution for any cause, by notifying the board of directors of such decision. If the Superintendent shall refuse to approve any resolution or ordinance submitted to him within ten (10) days after its receipt, he shall advise the board of directors of his reasons therefore. If these reasons appear to the board of directors to be insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its receipt by him, approve or reject the same in writing. Failure by the Secretary of the Interior to act within ninety (90) days from his receipt of the ordinance or resolution shall constitute approval of the resolution or ordinance.

ARTICLE VIII – BILL OF RIGHTS

All members of the Sault Ste. Marie Tribe of Chippewa Indians shall be accorded equal protection of the law under this constitution. No member shall be denied any of the rights or guarantees enjoyed by

citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of an Indian entity in the exercise of its powers of selfgovernment shall apply to members of the tribe.

ARTICLE IX – RIGHT OF REFERENDUM

Any enacted or proposed ordinance or resolution of the board of directors shall be submitted to a popular referendum upon an affirmative vote of a majority of the board or when so requested by a petition presented to the board bearing the signatures of at least one hundred (100) eligible voters of the tribe. Such referendum must be held within sixty (60) days after receipt by the board of a valid petition. A vote of a majority of the eligible voters voting in such referendum shall be conclusive and binding upon the board of directors provided, however, that at least thirty (30) percent of those entitled to vote shall vote in such referendum conducted pursuant to tribal ordinance.

ARTICLE X – AMENDMENTS

This constitution and bylaws may be amended by a majority vote of the eligible voters of the tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election, but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed

amendment upon the receipt of a resolution passed by a majority of the board of directors, the chairperson having the right to vote thereon.

ARTICLE XI – ADOPTION

This constitution and bylaws when ratified by a majority vote of the adult members of the organization known as the Original Bands of the Sault Ste. Marie Chippewa Indians, voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election, shall be submitted to the Secretary of the Interior and, if approved, shall become effective from the date of approval.

BYLAWS

ARTICLE I – MEETINGS OF THE BOARD OF DIRECTORS

Section 1. The board of directors shall meet once each month at such place, time and date as is designated by the board at the meeting immediately preceding. The place, time and date of the meeting shall be at the discretion of the board of directors, provided that at least one meeting per year shall be held in each of the five election units established pursuant to ARTICLE V, Section 1 of the tribal constitution.

Sec. 2. Special meetings may be called from time to time by the chairperson or by a majority vote of the board of directors. Written notice of such special meetings shall be given to all members of the board at least five (5) days in advance of such meeting. At special meetings, the board shall have the same power to transact business as at regular meetings.

Sec. 3. Both regular and special meetings of the board of directors shall be open to the membership of the tribe.

Sec. 4. All regular meetings shall be publicized at least ten (10) days in advance by some appropriate and effective means such as newspaper advertisements or radio announcements. Special meetings require such publicity as is reasonable under the circumstances, provided that all members of the board of directors receive notice as provided in Section 2 of this Article.

Sec. 5. No business at any regular or special meeting shall be transacted unless a quorum is present, a quorum being a majority of the board of directors.

Sec. 6. No member of the board of directors shall cast a vote on any matter in which the board determines by a majority vote that said member may have a personal interest in the matter.

Sec. 7. The duties of all appointed boards, committees or employees of the tribe shall be clearly defined by resolutions or the board of directors at the time of their creation or appointment. Such boards, committees or employees shall report from time to time, as required, to the board of directors, and their activities and decisions shall be subject to review by that board.

Sec. 8. It shall be the duty of each member of the board of directors to make monthly reports to the unit from which they are elected concerning the proceedings of the board.

Sec. 9. All ordinances, resolutions and minutes of meetings of the board of directors shall be kept on file in the tribal office and shall, upon reasonable request, be open for inspection by tribal members at such office during regular office hours.

ARTICLE II – DUTIES OF OFFICERS

Section 1. The chairperson shall preside over all meetings of the board of directors and exercise any

other lawful authority delegated the chairperson by the board of directors. The chairperson shall vote only in case of a tie unless otherwise provided by the tribe's constitution and bylaws.

Sec. 2. The vice-chairperson of the board of directors shall assist the chairperson when called upon to do so, and in the absence of the chairperson shall preside at all meetings of the board of directors. When so presiding the vice-chairperson shall have all of the rights, privileges, duties and responsibilities of the chairperson.

Sec. 3. The treasurer shall, under the direction of the board of directors, conduct all of the fiscal affairs of the tribe. The treasurer or a person designated by the board of directors shall accept, receive, receipt for, preserve and safeguard all funds in custody of the board of directors, whether the same be tribal funds or special funds for which the board is acting as trustee. The treasurer shall be bonded in an amount to be determined and furnished by the board of directors and shall deposit all funds in financial institutions as directed by the board of directors. The treasurer shall make and preserve a faithful record of such funds, and shall cause to be reviewed internally at least once every six months the books of tribal funds, and shall in writing report the results of this review to the board of directors. The treasurer shall, when called upon by the board of directors, give a status report on the fiscal condition of the tribe at any regular meeting. Once each fiscal year the treasurer shall cause the tribal funds to be subject to an independent audit. The treasurer shall, in addition, be party to each and every transaction of the tribe involving real estate and shall not pay out or otherwise disburse any tribal funds, except when properly authorized to do so by resolution or

ordinance duly adopted by the board of directors, which ordinance or resolution may be of a continuing nature, and countersigned by the chairperson.

Sec. 4. The secretary or such person as the secretary may designate shall conduct all tribal correspondence, including the noticing of meetings. The secretary shall keep an accurate record of all matters transacted at meetings of the board of directors and shall see that all ordinances and resolutions adopted by the board of directors are reduced to writing in the proper format and shall further see that a book maintaining copies of all current resolutions and ordinances is maintained and is accessible to all tribal members. Further, it shall be the duty of the secretary or such person as the secretary may designate to submit promptly to the appropriate office of the Bureau of Indian Affairs copies of all minutes of meetings of the board of directors and copies of all resolutions and ordinances adopted by the board.

ARTICLE III – TRIBAL RECORDS

Section 1. All books, records and financial accounts of the Sault Ste. Marie Tribe of Chippewa Indians, including the tribal roll, shall be open to inspection by tribal members upon reasonable request to the board of directors.

Sec. 2. All books, records and financial accounts kept by officers or employees of the tribe in connection with their tribal duties or employment are the property of the tribe and shall be maintained in the tribal office. Upon leaving office or employment, it shall be the duty of each tribal officer or employee to turn over such books, records and financial accounts to the appropriate successor.

TRIBAL CODE

CHAPTER 44:

WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION IN COMMERCIAL TRANSACTIONS

CONTENTS:

HISTORY NOTE:

Current Ordinance:

Adopted by Tribal Resolution No. 8-11-92-C, August 11, 1992, effective immediately.

Reenacted as part of the Tribal Code July 5, 1995, Resolution no. 95-89.

Amendments:

Amended November 7, 2001, deleting existing ’44.108 and enacting new ’44.108 by Tribal Resolution 2001-160.

Amended November 8, 2000, to add ’44.108 and make other changes, Tribal Resolution No. 2000-149

44.101 Purpose and Authority.

The purpose of this Chapter is to provide for the waiver of Tribal Court jurisdiction and sovereign immunity in those commercial transactions for which such waiver is necessary and beneficial to the Tribe. This Chapter is enacted pursuant to the authority contained in Article VII, Section 1(d), (g), (k), (l), (m), and (n) of the Tribal Constitution.

44.102 Findings and Declarations.

The Board of Directors hereby finds and declares that:

(1) The Tribe and Tribal members benefit from commercial transactions conducted within the mainstream of the local and national economy, and the Tribe has become increasingly successful and sophisticated in such commercial transactions.

(2) Tribal sovereign immunity, an aspect of Tribal sovereignty, is an important protection for Tribal assets and resources, but it can at times be an impediment to commercial transactions. Many potential business partners of the Tribe are reluctant to enter into contracts unless Tribal sovereign immunity is waived, thereby allowing recourse in the event of tribal default or breach of contract. The Tribe finds it necessary and desirable to waive its sovereign immunity from time to time in a prudent and limited manner in order to consummate business transactions of benefit to the Tribe and its members.

(3) Federal courts, spurred by recent decisions of the United States Supreme Court, have been enforcing a requirement that a party exhaust its Tribal Court remedies for actions against the Tribe or Tribal members arising on the reservation before availing themselves of federal or state court. As with Tribal sovereign immunity, however, many potential business partners are reluctant to enter commercial transactions with the Tribe if they believe their remedy upon breach or default is limited to Tribal Court. Because of this reluctance, the Tribe finds it necessary and desirable from time to time to waive Tribal Court jurisdiction over particular commercial transactions.

(4) The Tribe has the authority to waive its sovereign immunity, provided it does so knowingly in express terms. Likewise, the Tribe has the constitutional authority to define the jurisdiction of the Tribal Court, and it can waive Tribal Court jurisdiction in a way that is contractually binding in the future if it does so in clear and unmistakable terms. The Tribe possesses the necessary experience, expertise and sophistication to determine when such waivers are in the best interests of the Tribe.

(5) The Tribe has chartered and will continue to charter subordinate Tribal entities, such as the Housing Authority and the Economic Development Commission, which function autonomously for the most part within their spheres of authority. These Tribal entities are of economic benefit to the Tribe and often have need of authority to waive their own immunity to facilitate commercial transactions.

(6) Any waiver of Tribal Court jurisdiction or sovereign immunity made pursuant to this Chapter is hereby declared to be in the best interests of the Tribe and its members. Such waiver does not infringe

upon Tribal sovereignty, but instead is an affirmative expression and exercise of such sovereignty.

44.103 Definitions.

As used in this Chapter:

(1) "Board of Directors" means the Board of Directors of the Tribe, the Tribe's governing body duly elected pursuant to the Tribal Constitution.

(2) "Charter" means the organic document of a Tribal entity, and includes the Housing Authority Ordinance, Tribal Code Chapter 90, the Gaming Authority Charter, Tribal Code Chapter 94, and the Economic Development Commission Charter, Tribal Code Chapter 40, and any approved articles of incorporation.

(3) "Tribal Entity" means any entity created and owned by the Tribe for economic or governmental purposes and any entity which is controlled by the Board of Directors. For purposes of this Chapter, an entity shall be deemed to be controlled by the Board of Directors if a majority of the persons serving on the body which governs the entity are chosen by the Board of Directors or are required to be members of the Board of Directors. Entities governed by this Chapter include, but are not limited to, the Housing Authority, the Gaming Authority, the Economic Development Commission, and other organizations entitled or denominated 'authority,' 'enterprise,' 'corporation,' 'agency,' 'commission,' or terms of like import; provided, however, that committees of the Board of Directors shall not be deemed Tribal entities for purposes of this Chapter. For purposes of this Chapter, corporations, partnerships, limited liability companies, or similar entities formed under the laws of any State shall not be Tribal entities; provided, that this provision shall not affect the

sovereign immunity of the Tribe with regard to any such State entity;

(4) "Tribal Court" means the Sault Ste. Marie Chippewa Tribal Court established by Tribal Code Chapter 80.

(5) "Tribe" means the Sault Ste. Marie Tribe of Chippewa Indians.

44.104 Sovereign Immunity of Tribe.

The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly reaffirmed unless such immunity is waived in accordance with '44.105 or '44.108. A "sue and be sued" clause or other authorization for a Tribal entity to waive its own sovereign immunity shall not constitute authorization for waiver of the immunity of the Tribe itself. Except for a charter provision expressly authorizing a Tribal entity to waiver the sovereign immunity of the Tribe itself, such as that contained in the Economic Development Commission Charter, Tribal Code '40.108, nothing in a Tribal entity charter shall be deemed or construed to be a waiver of the sovereign immunity of the Tribe or the consent of the Tribe to suit in any forum.

44.105 Waiver of Sovereign Immunity of Tribe.

(1) The sovereign immunity of the Tribe may be waived:

(a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the

waiver, court having jurisdiction and applicable law. Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution; or

(b) by a Tribal entity exercising authority expressly delegated to such entity in its charter or specially by resolution of the Board of Directors; provided,that such waiver shall be made in strict conformity with the provisions of the charter or resolution governing such delegation.

(2) No express waiver of sovereign immunity by resolution shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe other than the property specifically pledged, assigned or identified in the resolution.

44.106 Sovereign Immunity of Tribal Entity.

A Tribal entity is endowed by federal law and the provisions of this Chapter with all the privileges and immunities of the Tribe, except as specifically limited in the charter of the Tribal entity. This includes sovereign immunity from suit in any state, federal or tribal court.

44.107 Waiver of Sovereign Immunity by Tribal Entity.

(1) The sovereign immunity of a Tribal entity may be waived:

(a) by a "sue and be sued" clause or other express waiver in the charter of the Tribal entity; or

(b) by express resolution of the governing body of the Tribal entity.

(2) Waivers of sovereign immunity by resolution shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal entity

or the Tribe. Waivers of sovereign immunity by resolution shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribal entity subject to the waiver, court having jurisdiction and applicable law.

(3) Neither a "sue and be sued" clause nor an express waiver of sovereign immunity by resolution of the Tribal entity shall be deemed a consent to the levy of any judgment, lien or attachment upon the property of the Tribal entity other than the property specifically pledged, assigned or identified in the resolution, or of any property of the Tribe.

44.108 Waiver of Sovereign Immunity for Proprietary Contracts.

(1) Notwithstanding any other provision of this Chapter, Tribal Code '40.108, '94.111, or '94.120, the Tribe hereby waives its sovereign immunity, as well as the sovereign immunity of the Sault Ste. Marie Tribe Economic Development Commission and the Kewadin Casinos Gaming Authority, for any claim sounding in contract brought in accordance with this section, provided:

(a) The claim arises from an express, written contract signed by all parties to the contract;

(b) The claim is brought by a party to the contract or a party expressly made a third-party beneficiary under the terms of the contract;

(c) The contract was entered into by the Sault Ste. Marie Tribe Economic Development Commission; a Tribal Business Enterprise, as defined in '40.115, subordinate to the Sault Ste. Marie Tribe Economic Development Commission; the Kewadin Casinos Gaming Authority; or a Licensed Gaming Establishment, as defined in '42.220, operated by the Kewadin Gaming Casinos Authority; and

(d) The contract was entered into in the performance of a proprietary function, which means any activity conducted primarily for the purpose of producing a pecuniary profit for the Tribe, the Sault Ste. Marie Tribe Economic Development Commission, or the Kewadin Casinos Gaming Authority excluding, however, any activity normally supported by a government unit by taxes or fees.

(2) Notwithstanding '44.108(1), the Tribe shall not be subject to suit under this section for:

(a) Suits based upon contracts entered into before November 8, 2000.

(b) Any claim sounding in tort, as that term is defined in Tribal Code '85.103(3).

(3) Any claim arising from or based upon employment.

(4) Any claim founded upon a provision of:

(1) A constitution, statute, or regulation of the United States or any State;

(2) A code or ordinance of the Tribe or of any local unit of government; or

(3) The Constitution and Bylaws of the Tribe.

(5) Any claim for exemplary, punitive, or consequential damages.

(6) Any suit based upon a contract not entered into in the performance of a proprietary function, including without limitation contracts relating to governmental functions or internal services.

(7) Any suit based upon a contract which contains provisions concerning sovereign immunity and consent to suit. For any such contract, the contractual provisions relating

to sovereign immunity shall supersede the application of this section.

(3) The waiver extends solely to funds contained in the Sault Ste. Marie Tribe Economic Development Commission accounts, as defined in Tribal Code '40.110(1) or Kewadin Casinos Gaming Authority accounts, as described in '94.113(4)(w), as applicable.

(4) The waiver of sovereign immunity contained in this section shall not apply to any claim unless notice of the claim has been presented to the Tribe in writing within 180 days after such claim accrue, or within 90 days after the claim has been discovered or should have been discovered in the exercise of reasonable diligence, whichever is later. Notice shall be served personally, by certified mail, return receipt requested, or by any other courier or delivery service for which a return receipt is obtained, upon the Board of Directors Secretary, Sault Ste. Marie Tribe of Chippewa Indians, 523 Ashmun Street, Sault Ste. Marie, Michigan 49783. The notice shall identify the contract upon which the complaint is based, the nature of the claim, and the relief requested. Service of a suit based upon the claim shall satisfy the notice requirement.

(5) The Tribe, the Sault Ste. Marie Tribe Economic Development Commission, and the Kewadin Casinos Gaming Authority consent to suit in any court of competent jurisdiction for suits based upon contract claims arising under this section; provided, that this consent shall not preclude objection to venue, forum non conveniens, or subject matter jurisdiction.

44.109 Waiver of Tribal Court Jurisdiction.

(1) The Board of Directors may waive by resolution the jurisdiction of the Tribal Court over any claim or cause of action which arises out of a commercial

transaction involving the Tribe, a Tribal entity, or a Tribal member, if all of the following conditions are met:

(a) the commercial transaction is specifically identified in the resolution; and

(b) the resolution contains factual findings supporting the conclusions that:

(i) the waiver is in the best interests of the Tribe, the Tribal entity or the Tribal member; and

(ii) the transaction could not be consummated without such waiver.

(2) Any waiver of Tribal court jurisdiction made in a accordance with this section shall be presumed to contain a waiver of Tribal court jurisdiction in clear and unmistakable terms and shall not continue an infringement upon Tribal sovereignty.

44.110 Vesting of Contractual Rights.

Any waiver of sovereign immunity or of Tribal Court jurisdiction by resolution as provided in this Chapter may be incorporated in the contract documents governing the transaction involved. When so incorporated, it is the intent and purpose of the Tribe that there is created a vested contractual right to the waiver which cannot be impaired or abrogated by the later repeal or amendment of this Chapter or of the resolution creating the right. The repeal or amendment of this Chapter or of any resolution containing a waiver of sovereign immunity or Tribal Court jurisdiction adopted in conformity with this Chapter, or any other Tribal action inconsistent with the waiver shall not repeal, modify, abrogate or impair any provision of a contract containing a waiver of sovereign immunity or Tribal Court jurisdiction incorporated in such contract pursuant to this section.

44.111 Applicability and Effective Date.

This Chapter shall take effect immediately upon its enactment by resolution of the Board of Directors. It shall have prospective application only and shall not apply to or limit any waiver made by the Tribe or a Tribal entity acting within the scope of its authority prior to the effective date of this Chapter.